



Land and Environment Court
New South Wales

Case Name: Hamptons Property Services Pty Ltd v City of Canada Bay Council

Medium Neutral Citation: [2025] NSWLEC 1145

Hearing Date(s): Conciliation conference on 13 January 2025 and 21 February 2025

Date of Orders: 13 March 2025

Decision Date: 13 March 2025

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:
(1) The Applicant is to pay the Council's costs thrown away pursuant to section 8.15(3) of the Environmental Planning and Assessment Act 1979 as a result of the amendment to the development application, agreed in the amount of \$10,000.
(2) The appeal is upheld.
(3) Development consent is granted to Development Application No 2024/0138, as amended, for the demolition of existing structures (including three (3) existing dwellings), tree removal, construction of a three (3) level basement for 33 car parking spaces, four (4) visitor spaces, 66 bicycle parking spaces and eight (8) motor cycle parking spaces, on-site loading bay with turntable for HRV access, construction of 33 dwellings (including five (5) adaptable apartments), on-site landscaping, communal open space, including on Level 2, and residential amenities and building services at 2-4 Denham Street, Rhodes, contained in Lot 2157 DP1096531, Lot 163 DP6401 and SP 83927, subject to the conditions of consent at Annexure B.

Catchwords: DEVELOPMENT APPLICATION: residential apartment development – residential flat building in R4 High Density Residential zone – conciliation conference – agreement between parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.16, 4.46, 4.5, 8.7, 8.15
Water Management Act 2000, s 90
Land and Environment Court Act 1979, s 34
Canada Bay Local Environmental Plan 2013, cll 4.1A, 4.3, 4.4, 5.2, 5.10, 5.21, 6.1, 6.2, 6.10, 6.11, 6.14, 7.2, 7.8, 7.9, 7.12, Sch 5
Environmental Planning and Assessment Regulation 2021, ss 29, 38
State Environmental Planning Policy (Biodiversity and Conservation) 2021, Ch 2, Ch 6, Part 6.2, ss 6.6, 6.7, 6.8, 6.9
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Housing) 2021, ss 147, 148, Sch 9
State Environmental Planning Policy (Planning Systems) 2021, Pt 2.4
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
State Environmental Planning Policy (Sustainable Buildings) 2022, s 2.1
State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.48, 2.119, 2.120, 2.122

Cases Cited: Toga Penrith Developments Pty Limited v Penrith City Council [2022] NSWLEC 117

Texts Cited: NSW Department of Planning and Environment, Apartment Design Guide (July 2015)

Category: Principal judgment

Parties: Hamptons Property Services Pty Ltd (Applicant)
City of Canada Bay Council (Respondent)

Representation: Counsel:
L Camenzuli (Solicitor) (Applicant)
R McCulloch (Solicitor) (Respondent)

Solicitors:

File Number(s): 2024/353266

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** Residential apartment development is proposed on land located at the corner of Denham Street and Concord Road in Rhodes. Specifically, development application DA 2024/0138 (the DA) seeks consent for demolition of existing structures, removal of trees and the construction of 33 dwellings over three levels of basement, landscaping and related works at a site known as 2-4 Denham Street, within which is a drainage reserve known as lot 163 in DP 6401 (the site).
- 2 The DA was lodged by the Applicant in these proceedings, Hampton Property Services Pty Ltd (Hamptons) on 24 July 2024. On 24 September 2024, as the DA was not otherwise determined, Hamptons filed an appeal under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) in Class 1 of the Court's jurisdiction.
- 3 On 13 January 2025, the Court arranged a conciliation conference between the parties in accordance with s 34(1) of the Land and Environment Court Act 1979 (LEC Act), at which I presided.
- 4 At the conciliation conference, the parties reached agreement on the matters in contention, subject to the preparation of amended plans for which an adjournment was granted.
- 5 It is also relevant to record that as the proposed development is considered to have a capital investment value greater than \$5m, and involves land in the ownership of the City of Canada Bay Council the development the subject of the DA is properly classified as Regionally Significant Development pursuant to Part 2.4 of the State Environmental Planning Policy (Planning Systems) 2021.
- 6 Accordingly, for the purposes of s 4.5(b) of the EPA Act, the Sydney Eastern City Planning Panel (the Panel) is the consent authority. Council, under the control and direction of the Panel referred the DA to the Panel on 10 January

2025, and the Panel provided delegation for Council to enter into the Section 34 Agreement on 13 February 2025.

- 7 A signed agreement was submitted to the Court on 21 February 2025, in accordance with s 34(10) of the LEC Act.
- 8 The parties ask me to approve their decision as set out in the s 34 agreement before the Court. This decision involved the Court upholding the appeal and granting conditional development consent to the DA.
- 9 In general terms, the agreement approves the development subject to amended plans that were prepared by the Applicant, and noting that the final detail of the works and plans are specified in the agreed conditions of development consent annexed to the s 34 agreement.
- 10 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 development application. There are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 11 For the reasons set out below, I am satisfied that the parties' decision is a decision that the Court could have made in the proper exercise of its functions.
- 12 The DA was lodged with the consent of the owners of that part of the site not in the ownership of the Council. The DA was publicly notified between 25 July 2024 and 23 August 2024.
- 13 The site is located in the R4 High Density Residential zone, according to the Canada Bay Local Environmental Plan 2013 (CBLEP) in which residential flat buildings are permitted with consent, where consistent with the objectives of the R4 zone, that are:
 - 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.
 - To enable other land uses that provide facilities or services to meet the day to day needs of residents.

- 14 The proposed development complies with the minimum lot size requirements set out in the relevant column at cl 4.1A of the CBLEP, and complies with the height standard of 31m at cl 4.3 of the CBLEP.
- 15 The floor space ratio (FSR) standard shown on the relevant map at cl 4.4(2) of the CBLEP is 1.7:1. However, as the proposal is for a BASIX affected building on land in the Cavell Avenue Character Area, cl 7.11(1) of the CBLEP permits an exceedance of the FSR by 5%, subject to provisos that are met by the proposed development. As such, the proposed FSR of 1.78:1 complies with the permissible FSR of 1.785:1.
- 16 The drainage reserve that traverses the site, being legally described as Lot 163 DP 6401 is classified as public land, specifically operational land, in accordance with cl 5.2 of the CBLEP 2013;
- 17 While the site is not identified for its heritage significance, and is not located within a heritage conservation area, it is located in the vicinity of heritage items listed in Sch 5 of the CBLEP.
- 18 The Site does not contain a heritage item and is not located within a heritage conservation area, however the Site is located within the vicinity of heritage items for the purposes of cl 5.10 of the CBLEP 2013. A Statement of Heritage Impact, prepared by Weir Philips Heritage and Planning dated 14 November 2024 (the SHI) identifies the items within the vicinity of the site, including a row of mature Phoenix Palm trees on Cavell Street around 100m from the site. The SHI also sets out reasons the proposal is acceptable in its context, and provides a detailed consideration of the effect of the proposal on each of the heritage items. On the basis of the consideration set out in the SHI, I accept the effect of the proposed development on those heritage items is acceptable.
- 19 It is commonly held the site is flood affected, and the DA is accompanied by an Overland Flow Assessment prepared by JHA dated 20 November 2024 (the Flow Assessment). The Flow Assessment concludes that overland flow travels across the southern portion of the site in the vicinity of the drainage reserve and converges at the corner of Concord Road and Denham Street to a maximum depth of 600mm. A flood planning level of 11.30m AHD applies to the site, and the ground floor is set well above this level.

- 20 As no fill or structures are proposed in the drainage reserve, the proposal does not reduce the extent of flood storage nor alter the existing flood flow regime, and flood refuge is designed at level 2 of the proposal to manage risk of life in the event of flood. As such, I have considered those matters to be considered at cl 5.21(3)(a)-(d) of the CBLEP and I am satisfied of those matters at cl 5.21(2) of the CBLEP.
- 21 Not unrelatedly the site is also identified as Class 5 Acid Sulfate Soil, according to the relevant map at cl 6.1(2) of the CBLEP, and is in close proximity to soil classified Class 1, 2 and 4 land. However, a letter prepared by Geotechnical Consultant, EI Australia, dated 20 August 2024 concludes the soil on the site does not display characteristics of acid sulfate soils. The Council agrees with this position and I likewise conclude an acid sulfate soils management plan is not required.
- 22 The development proposes excavation for the purpose of basement parking and other services. An amended Geotechnical Impact Assessment prepared by EI Australia dated 21 November 2024 (Geotechnical Assessment) records the depth of three boreholes on the site, measurement of groundwater seepage, and subsurface conditions. On the basis of the Geotechnical Assessment, Civil engineering drawings prepared by JHA Engineers dated 21 November 2024 and Landscape plans prepared by Site Image I consider those matters at cl 6.2(3) of the CBLEP in respect of earthworks to be satisfactorily addressed.
- 23 The proposed development is subject to s 90 of the Water Management Act 2000 as it requires a water management work approval and so the development is integrated development pursuant to s 4.46 of the EPA Act. WaterNSW advised of no objection to the proposal and provided general terms of approval on 8 August 2024 that are incorporated in agreed conditions of consent.
- 24 The Site is identified as an “Intensive Urban Development Area” on the relevant Intensive Urban Development Area Map at cl 6.10 of the CBLEP. The Council is satisfied that essential services for the proposed development are

available or adequate arrangements have been made to make them available when required for the purposes of cl 6.10 of the CBLEP.

- 25 The parties agree that the mix of dwelling sizes proposed in the development complies with the mix required by cl 6.11(3) of the CBLEP for in residential flat buildings comprising at least 10 dwellings.
- 26 It is common between the parties that the proposed development exhibits design excellence as required by cl 6.14 of the CBLEP, with reference to those matters at cl 7.2(3) of the CBLEP. However, as shown by Preston CJ in *Toga Penrith Developments Pty Limited v Penrith City Council* [2022] NSWLEC 117 (*Toga*), the Court must have regard to the particular terms of, and answer the particular questions raised by, the matters in the design excellence provisions (*Toga*, at [75]).
- 27 I have considered whether the proposal exhibits design excellence in terms set out in cl 7.2(2) of the CBLEP. I conclude it does, for reasons similar to those set out at pp112-136 of the Statement of Environmental Effects prepared by Hamptons (the SEE). I am also assisted by the description of the development contained in the Urban Design Report prepared by Dickson Rothschild dated 22 November 2024 as to whether the proposal is a high standard of architectural design, detail and materials appropriate to the type and location of the proposal. Likewise, on the information contained in the SEE and Urban Design Report, I also accept that the single tower form and podium distributes floor space evenly across the site while accommodating substantial landscape interface with the street and does not obstruct view corridors, nor detract from the heritage and streetscape values of the area. The proposal maintains appropriate setback and separation with adjoining properties, and an appropriate bulk, massing and modulation with street frontage heights that are compatible with those in Denham Street.
- 28 The proposal does not seek consent for development that exceeds the maximum permitted number of car parking spaces specified at cl 7.8 of the CBLEP.
- 29 Development consent is precluded by terms at cl 7.9 of the CBLEP, unless the building utilises a dual water reticulation system containing pipes for potable

water and recycled water for all internal and external water uses. As no such reticulation system exists in the Rhodes precinct, the requirement for a detailed design for the same to be demonstrated prior to issue of a construction certificate is imposed by an agreed conditions of consent.

- 30 As the proposal is located within the Cavell Avenue Character Area I note that no part of the front part of the building exceeds 10m in height in accordance with cl 7.12(3) of the CBLEP, and those dwellings fronting Denham Street have individual entrances, in accordance with cl 7.12(3) of the CBLEP.

State Environmental Planning Policy (Biodiversity and Conservation) 2021

- 31 Chapter 2 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity SEPP) applies to the site. The development application is accompanied by an Arboricultural Impact Assessment prepared by Advanced Treescape Consulting dated 22 November 2024 that identifies five trees for removal and three to be retained. I note s 2.6 of the Biodiversity SEPP allows for the removal of vegetation with consent.
- 32 The proposed development is located within the Sydney Harbour Catchment which is a “regulated catchment” for the purposes of Chapter 6 of the Biodiversity SEPP. I have considered those matters that are required to be considered in Part 6.2 of the Biodiversity SEPP and, on the basis of the Civil engineering plans prepared by JHA Engineers dated 21 November 2024 that depict onsite detention (OSD) of stormwater and water quality treatment devices within grated access pits, and in the OSD, and MUSIC modelling that demonstrates a reduction in pollutants in the post development flow, and the letter from JHA Consulting Engineers dated 6 February 2025, I am satisfied that the effect of the development on the quality of water entering a natural waterbody will be as close as possible to neutral or beneficial, and that the impact on water flow in a natural waterbody will be minimised, in accordance with s 6.6 of the Biodiversity SEPP.
- 33 On the basis of the identical documents to those set out above, I am also satisfied of those matters about which the Court must be satisfied at ss 6.7, 6.8 and 6.9 of the Biodiversity SEPP.

State Environmental Planning Policy (Resilience and Hazards) 2021

- 34 I have considered whether the land is contaminated in accordance with s 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021. On the basis of the investigations undertaken and conclusions contained in the Preliminary Site Investigation prepared by EI Australia dated 7 February 2025, I am satisfied the site is suitable for the purpose for which development is proposed to be carried out.

State Environmental Planning Policy (Housing) 2021

- 35 As the proposed development is residential apartment development, the Court is required by s 147 of State Environmental Planning Policy (Housing) 2021 (Housing SEPP) to consider the quality of the design of the development, evaluated in accordance with the design principles at Sch 9.
- 36 I am assisted in so doing by a statement dated 26 September 2024 and prepared in accordance with s 29 of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation) that attests Mr Paul Buljevic (Arch Reg No. 7768) directed the design of the proposal, and sets out the means by which the design principles have been applied in the proposed development, and how the objectives in Parts 3 and 4 of the Apartment Design Guide are addressed.
- 37 The Council's Design Review Panel has considered the proposal and provided advice on the design.
- 38 On the basis of the statement, I am satisfied the development as proposed meets the requirements set out in s 148 of the Housing SEPP.

State Environmental Planning Policy (Transport and Infrastructure) 2021

- 39 As the proposal is within the vicinity of an electrical distribution pole, the proposed development has been referred to the electricity supply authority in accordance with s 2.48(2) of State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport SEPP), and a written response has been taken into consideration.
- 40 As the proposed development is development on land with a frontage to a classified road, s 2.119 of the Transport SEPP sets out the matters about

which the consent authority, or Court on appeal, must be satisfied before granting consent to the carrying out of the development. Relevantly, vehicular access is via Denham Street with a nett increase in vehicle trips of 4 during the morning peak, and 2 during the afternoon peak. As such, I am satisfied of those matters at s 2.119(2) of the Transport SEPP.

- 41 The proposed development is also subject to s 2.120 of the Transport SEPP by virtue of the development being development for the purpose of residential accommodation on land adjacent to a road corridor which has an annual average daily traffic volume of more than 20,000 vehicles. A Noise Impact Assessment prepared by E Lab Consulting 22 November 2024 (Acoustic Report) proposes design mitigation measures to address potential impacts from traffic noise generated by Concord Road, and the potential impact of noise from other sources such as plant and equipment on neighbouring properties from the operation of the proposed loading dock. I note the Acoustic Report concludes that acceptable levels will be achieved, subject to those measures recommended at Section 6. On this basis I am satisfied that appropriate measures of a kind required by s 2.120(3) of the Transport SEPP will be taken so that certain levels are not exceeded.
- 42 While the proposed development is not traffic generating development according to the terms at s 2.122 of the Transport SEPP, the proposal was referred to Transport for NSW in accordance with s 2.122 and a response received from TfNSW dated 7 August 2024 provided general terms of approval that are incorporated in agreed conditions of consent.

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

- 43 The application is accompanied by a BASIX certificate (Cert No. 1736166M_04 prepared by ESD Synergy Pty Ltd and dated 21 November 2024) in accordance with State Environmental Planning Policy (Sustainable Buildings) 2022 (Sustainable Buildings SEPP), supported by NatHERS Certificate prepared by Greenvue Consulting dated 29 January 2025.
- 44 An embodied energy report is a part of the BASIX Certificate, such that the Court can be satisfied that the embodied emissions attributable to the

proposed development have been quantified in accordance with s 2.1(5) of the Sustainable Buildings SEPP.

Conclusion

- 45 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.
- 46 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.
- 47 The Court notes that the Council has approved, pursuant to s 38 of the EPA Regulation, the amendment of the development application in accordance with the amended plans and documentation referred to in the index at Annexure A.

Orders

- 48 The Court orders that:
- (1) The Applicant is to pay the Council's costs thrown away pursuant to section 8.15(3) of the *Environmental Planning and Assessment Act 1979* as a result of the amendment to the development application, agreed in the amount of \$10,000.
 - (2) The appeal is upheld.
 - (3) Development consent is granted to Development Application No. 2024/0138, as amended in accordance with paragraph 2, for the demolition of existing structures (including three (3) existing dwellings), tree removal, construction of a three (3) level basement for 33 car parking spaces, four (4) visitor spaces, 66 bicycle parking spaces and eight (8) motor cycle parking spaces, on-site loading bay with turntable for HRV access, construction of 33 dwellings (including five (5) adaptable apartments), on-site landscaping, communal open space, including on Level 2, and residential amenities and building services at 2-4 Denham Street, Rhodes, contained in Lot 2157 DP1096531, Lot 163 DP6401 and SP 83927, subject to the conditions of consent at Annexure B.

T Horton

Commissioner of the Court

Annexure A

Annexure B

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