



Land and Environment Court  
New South Wales

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Case Name: UPG Talavera 10 Pty Ltd v City of Ryde Council

Medium Neutral Citation: [2023] NSWLEC 1261

Hearing Date(s): Conciliation conference on 9 May 2023

Date of Orders: 31 May 2023

Decision Date: 31 May 2023

Jurisdiction: Class 1

Before: Chilcott C

Decision: The Court orders that:  
(1) Pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979, the Applicant is to pay the Respondent's costs thrown away as a result of amendment of the development application the subject of this appeal on 11 May 2023, in a sum as agreed or as assessed.  
(2) The Applicant's written requests under cl 4.6 of the Ryde Local Environmental Plan 2014 (RLEP) seeking to vary the height and FSR development standards in cl 4.3 and 4.4 of RLEP respectively are upheld.  
(3) The appeal is upheld.  
(4) Development consent is granted to development application No. LDA2022/0020 for construction of a 14-storey residential flat building with 119 apartments, 3 basement levels containing 124 car spaces, landscaping and associated works at 94 Talavera Road, Macquarie Park subject to the conditions of consent at Annexure 'B'.

Catchwords: DEVELOPMENT APPLICATION – conciliation conference – agreement between the parties – orders.

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7, 8.15

Environment Planning and Assessment Regulation  
2000, cl 55  
Land and Environment Court Act 1979, ss 34, 39  
Ryde Local Environmental Plan 2014, cl 2.3, 4.3, 4.4,  
4.6, 5.21, 6.2, 6.4  
State Environmental Planning Policy (Building  
Sustainability Index: BASIX) 2004  
State Environmental Planning Policy No 65 – Design  
Quality of Residential Apartment Development, cl 28  
State Environmental Planning Policy (Resilience and  
Hazards) 2021, s 4.6  
State Environmental Planning Policy (Transport and  
Infrastructure) 2021, ss 2.119, 2.120, 2.121, 2.122

Texts Cited: City of Ryde, Ryde Community Participation Plan,  
2019  
NSW Department of Planning and Environment,  
Apartment Design Guide, 2015  
NSW Department of Planning and Environment,  
Planning Circular PS20-002, 2020  
Ryde Development Control Plan 2014

Category: Principal judgment

Parties: UPG Talavera 10 Pty Ltd (Applicant)  
City of Ryde Council (Respondent)

Representation: Counsel:  
J Strati (Solicitor) (Applicant)  
M Chillari (Solicitor) (Respondent)  
  
Solicitors:  
Urban Property Group (Applicant)  
City of Ryde Council (Respondent)

File Number(s): 2022/237346

Publication Restriction: No

## JUDGMENT

- 1 **COMMISSIONER:** UPG Talavera 10 Pty Ltd (the Applicant) has appealed the refusal by City of Ryde Council (the Respondent) of its Development Application No LDA2022/0020 for construction of a 14-storey residential flat building with 119 apartments, 3 basement levels containing 124 car parking

spaces, landscaping and associated works (the Proposed Development) at 94 Talavera Road, Macquarie Park, legally described as Lot 10 in DP1269407 (the Subject Site).

- 2 The appeal is made under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and falls within Class 1 of the Court's jurisdiction. The appeal is determined pursuant to the provisions of s 4.16 of the EP&A Act.
- 3 The Applicant's Development Application was notified between from 2 March 2023 to 16 March 2023 pursuant to the provisions of the City of Ryde Community Participation Plan, 2019, and 11 submissions were received in response to the notification. These submissions have been considered throughout the development assessment process.
- 4 On 9 May 2023, the Parties participated in a s 34 conciliation conference under the *Land and Environment Court Act 1979* (LEC Act) and reached an in-principle agreement regarding the granting of consent to the Applicant's amended development application, subject to conditions.
- 5 No site inspection had been undertaken prior to the commencement of the conciliation conference and no objectors sought to make submissions to the Court during the proceedings.
- 6 Under the Parties' agreement, which included the terms of a decision in the proceedings that would be acceptable to the Parties, the appeal would be finalised through the Court upholding the appeal and granting consent to the Applicant's amended development application, subject to conditions.
- 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 There are jurisdictional matters that must be satisfied before the Court can exercise its power to grant consent to the Proposed Development, and those requirements have been satisfied as follows:
  - (1) in relation to the provisions of State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP R&H):

- (a) section 4.6 of SEPP R&H requires a consent authority, or the Court on appeal, to consider the contamination and remediation of land when determining a development application, and in relation to this:
  - (i) the Applicant's Detailed Site Investigation prepared by EI Australia dated 29 November, at Parts 9 and 10, concluded that the Subject Site is suitable for the Proposed Development without the need for remediation;
  - (ii) I am satisfied that the Subject Site is suitable for its intended use under the Proposed Development; and
  - (iii) I am further satisfied that the provisions of s 4.6 of SEPP R&H have been satisfied in relation to the Proposed Development in the current appeal.
- (2) in relation to the provisions of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX):
  - (a) the Applicant has provided a BASIX certificate No.1260203M\_04 dated 10 May 2023 in relation to the Proposed Development; and
  - (b) I am satisfied that the relevant provisions of SEPP BASIX have been satisfied in relation to the Proposed Development.
- (3) In relation to the provisions of State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65):
  - (a) clause 28(2) of SEPP 65 requires that the consent authority, or the Court on appeal, should consider the design quality of the development when assessed against the design quality principles and the Apartment Design Guide (the ADG); and
  - (b) the Parties advise, and I am satisfied, that the Applicant's Statement of Environmental Effects (SEE) prepared by Ethos Urban dated 7 December 2021, together with an SEE Addendum dated 9 August 2022, along with its Design Verification Statement prepared by Cox Architects dated February 2023, satisfactorily address the design quality principles and the objectives of Parts 3 and 4 of the ADG;
- (4) in relation to the provisions of State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP T&I):
  - (a) sections 2.119 to 2.122 of SEPP T&I apply to the Proposed Development as the Subject Site has a boundary on the M2 motorway which is a classified road; and
  - (b) the provisions of s 2.119 are satisfied as the Proposed Development includes access to and from a non-classified road, namely, Talavera Road;
  - (c) the provisions of s 2.120 are satisfied as the Proposed Development will meet the noise levels required under the

provisions of s 2.120(3) of SEPP T&I, as confirmed by the Applicant's Road Noise Impact Assessment prepared by ELab dated 10 August 2022;

- (d) the provisions of s 2.121 require consideration of comments provided by Transport for NSW (TfNSW) regarding geotechnical matters identified in subs 2.121(2)(b)(i) together with other related matters identified in subss 2.121(2)(b)(ii)-(iv); and
  - (i) the Respondent has confirmed that it referred the Applicant's development application to TfNSW on the 20 January 2022 and TfNSW responded on 24 February 2022 raising no objections but requiring the imposition of certain conditions of consent;
  - (ii) the Respondent also referred the Applicant's amended application to TfNSW on 25 August 2022, and on 21 September 2022; TfNSW responded raising no objection and reiterated the conditions of consent required to be imposed as per the TfNSW response to Council of 24 February 2022;
  - (iii) the matters identified in s 2.121 of SEPP T&I have been considered within the Applicant's Geotechnical Report prepared by EI Australia dated 27 February 2023;
  - (iv) the Parties have agreed that the conditions that TfNSW require to be imposed with any grant of consent to the proposed Development are those in Conditions 61, 72, 73, 74, 85, 97, 98, 114, 156, 157 of the Parties' agreed conditions of consent;
- (e) the provisions of s 2.122 require consideration of the commentary provided by TfNSW regarding traffic issues, consistent with the requirements of subs 2.122(4)(b)(i), as well as the other related matters identified in subss 2.122(4)(b)(ii)-(iii));
- (f) these matters are addressed by the Applicant's Traffic Impact Assessment prepared by Traffix dated 5 December 2022;
- (5) in relation to the provisions of Ryde Local Environmental Plan 2014 (RLEP):
  - (a) the Subject Site is zoned B4 Mixed Use under the provisions of cl 2.3 of RLEP and development for the purpose of residential accommodation is permissible with consent in this zone;
  - (b) the Parties have advised, and I am satisfied, that the objectives of the B4 Mixed Use zone have been considered in relation to the assessment and determination of the Applicant's development application;
  - (c) in relation to the provisions of cl 4.3 concerning height, the height limit for the land is 45m and the Proposed Development in part

exceeds the height limit by up to 1.478m (or 3.3%), and I'm satisfied that the Applicant's written request pursuant to cl 4.6 of RLEP, seeking to justify the height exceedance, should be upheld because, it has adequately demonstrated that:

- (i) compliance with the height standard is unreasonable and unnecessary on the basis that the objectives of the height control are met, notwithstanding the numeric variation as required under cl 4.6(3)(a) of RLEP; and
  - (ii) there are sufficient environmental planning grounds to justify breaching the height control as required under cl 4.6(3)(b) of RLEP.
  - (iii) as required by cl 4.6(4)(a)(ii), the request establishes that approval of the Proposed Development is in the public interest because it is consistent with the objectives of the height of buildings development standard in cl 4.3 of RLEP and with the objectives of the B4 zoning of the Subject Site.
  - (iv) as required under cl 4.6(4)(b) of RLEP, whilst concurrence of the Secretary is not required by virtue of the Court's powers under s 39(6) of the LEC Act, that concurrence can be assumed for the purposes of cl 4.6(4)(b) of RLEP by virtue of the Assumed Concurrence Notice dated 21 February 2018 published by the Department of Planning and Environment (see Planning Circular PS20-002 dated 5 May 2020) noting additionally that the objection identifies how no matters of significance for State or regional environmental planning are raised by the height contravention
- (d) in relation to the provisions of cl 4.4 of RLEP concerning floor space ratio (FSR) applicable to development on the Subject Site, the FSR development standard for the Subject Site is 3.5:1, and the Proposed Development exceeds that standard by 0.19:1 (or 5.14%), and I'm satisfied that the Applicant's written request pursuant to cl 4.6 of RLEP, seeking to justify the FSR exceedance, should be upheld because, it has adequately demonstrated that:
- (i) compliance with the FSR standard is unreasonable and unnecessary on the basis that the objectives of the height control are met, notwithstanding the numeric variation as required under cl 4.6(3)(a) of RLEP; and
  - (ii) there are sufficient environmental planning grounds to justify breaching the height control as required under cl 4.6(3)(b) of RLEP.
  - (iii) as required by cl 4.6(4)(a)(ii), the request establishes that approval of the Proposed Development is in the public interest because it is consistent with the objectives of the

height of buildings development standard in cl 4.3 of RLEP and with the objectives of the B4 zoning of the Subject Site.

- (iv) as required under cl 4.6(4)(b) of RLEP, whilst concurrence of the Secretary is not required by virtue of the Court's powers under s 39(6) of the LEC Act, that concurrence can be assumed for the purposes of cl 4.6(4)(b) of RLEP for the reasons provided above in relation to the height of buildings breach (see above at [(c)(iv)]).
- (e) in relation to the provisions of cl 5.21 of RLEP concerning flood planning:
  - (i) the Parties have confirmed that the Subject Site is not identified as being in a flood planning area for the purposes of RLEP;
  - (ii) nevertheless, there is correspondence between the Respondent and the Applicant's stormwater engineer identifying that a slight portion of the site sits within the 1% annual exceedance probability (AEP) plus 500mm freeboard level which is the flood planning level applied by the Respondent under RLEP; and
  - (iii) the Applicant's 'Flood Statement Letter prepared by S&G Consultants dated 7 November 2021' addresses how flooding issues are satisfactorily addressed and confirms, as a consequence, that no part of the Proposed Development lies within the area of flood affectation discussed above (at [(ii)]);
- (f) in relation to the provisions of cl 6.2 concerning earthworks, the Applicant's Geotechnical Report identifies that the excavation associated with the Proposed Development can be carried out in an appropriate manner and provides the information necessary to address the requirements of this clause such that the matters in cl 6.2(3) have been considered prior to the grant of consent;
- (g) in relation to the provisions of cl 6.4 of RLEP concerning stormwater management the Parties have advised and I am satisfied, that the Applicant's stormwater concept plans confirm that the Proposed Development:
  - (i) is designed to maximise the use of water permeable surfaces on the land having regard to the soil characteristics affecting on-site infiltration of water, and
  - (ii) includes on-site stormwater retention for use as an alternative supply to mains water, groundwater or river water, and

- (iii) avoids any significant adverse impacts of stormwater runoff on adjoining properties, native bushland and receiving waters;
- (6) in relation to the provisions of City of Ryde Development Control Plan 2014 RDCP):
  - (a) the Parties have considered the relevant provisions of RDCP, including those in Part 4.5 in relation to the Macquarie Park Corridor, and they agree, and I am satisfied, that:
    - (i) the Proposed Development is compliant with the provisions of the relevant parts of RDCP; or if not,
    - (ii) the Proposed Development achieves the objectives of the controls in RDCP such that it merits flexibility in the application of the relevant controls pursuant the provisions of s 4.15(3A)(b) of the EP&A Act.
- 9 Having considered the advice of the Parties, provided above at [8], I agree that:
  - (1) regard has been had to the objectives of the Subject Site's B4 Mixed Use zoning in determining the Applicant's development application;
  - (2) the Applicant's development application can be approved having regard to the matters in subss 4.15(1)(b)–(e) of the EP&A Act, including in relation to the submissions received in response to notification, which have been considered by the Parties in reaching agreement;
  - (3) the jurisdictional prerequisites on which I must be satisfied before I can exercise the power under s 4.16 of the EP&A Act have been satisfied; and
  - (4) approval of the Proposed Development is in the public interest.
- 10 Further, 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.
- 11 As the Parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required to dispose of the proceedings in accordance with the Parties' decision.
- 12 In making the orders to give effect to the agreement between the Parties, I was not required to make, and have not made, any merit assessment of the issues that were originally in dispute between the Parties.
- 13 The Court notes that:
  - (1) The City of Ryde Council, as the relevant consent authority, has agreed under cl 55 of the Environmental Planning and Assessment Regulation



2000 to the Applicant amending Development Application No LDA2022/0020 in accordance with the documents listed in Annexure 'A' ('Amended Application'), which have been uploaded to the NSW Planning Portal.

- (2) the Applicant has filed the Amended Application with the Court on 9 May 2023.

## **Orders**

14 The Court orders that:

- (1) Pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, the Applicant is to pay the Respondent's costs thrown away as a result of amendment of the development application the subject of this appeal on 11 May 2023, in a sum as agreed or as assessed.
- (2) The Applicant's written requests under cl 4.6 of the Ryde Local Environmental Plan 2014 (RLEP) seeking to vary the height and FSR development standards in cll 4.3 and 4.4 of RLEP respectively are upheld.
- (3) The appeal is upheld.
- (4) Development consent is granted to development application No. LDA2022/0020 for construction of a 14-storey residential flat building with 119 apartments, 3 basement levels containing 124 car spaces, landscaping and associated works at 94 Talavera Road, Macquarie Park subject to the conditions of consent at Annexure 'B'.

**M Chilcott**

**Commissioner of the Court**

[237346.22 Annexure A \(176319, pdf\)](#)

[237346.22 Annexure B \(838854, pdf\)](#)

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## **Amendments**

01 June 2023 - Correction of typographical error at [14].

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