



Land and Environment Court  
New South Wales

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Case Name: Dynasty ABC Investment Holdings Pty Ltd v North Sydney Council

Medium Neutral Citation: [2023] NSWLEC 1126

Hearing Date(s): Conciliation conference held 18 October, 2 November, 23 November and 19 December 2022, 20 February and 3 March 2023, final agreement filed 3 March 2023

Date of Orders: 22 March 2023

Decision Date: 22 March 2023

Jurisdiction: Class 1

Before: Pullinger AC

Decision: The Court Orders that:  
(1) Leave is granted to the Applicant to amend Development Application DA 58/2022 and rely upon the amended plans and documents referred to at Condition 1 of Annexure A.  
(2) Pursuant to section 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 amending the Development Application in the agreed sum of \$35,000 within 28 days of the date of these orders.  
(3) The Applicant's written request, pursuant to clause 4.6 of the North Sydney Local Environmental Plan 2013 (NSLEP), seeking to vary the development standard for height of building as set out at clause 4.3 of the NSLEP, is upheld.  
(4) The appeal is upheld.  
(5) Consent is granted to Development Application DA 58/2022 (as amended) for demolition of existing commercial office building, excavation to accommodate 8 basement levels, construction of a new 37-storey

commercial tower, planting of 2 additional street trees, and augmentation and diversion of existing utilities infrastructure at 107 Mount Street, North Sydney, subject to the conditions of consent at Annexure A.

Catchwords: DEVELOPMENT APPLICATION – commercial office building – cl 4.6 written request – height of buildings – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7, 8.15  
Land and Environment Court Act 1979, s 34  
North Sydney Local Environmental Plan 2013, cll 2.3, 4.3, 4.6, 5.6, 6.1, 6.3  
State Environmental Planning Policy (Biodiversity and Conservation) 2021  
State Environmental Planning Policy (Planning Systems) 2021, Sch 6  
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6  
State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.48, 2.122  
Sydney Water Act 1994, s 78

Texts Cited: NSW Department of Planning and Environment, Planning Circular PS 18-003, February 2018

Category: Principal judgment

Parties: Dynasty ABC Investment Holdings Pty Ltd (Applicant)  
North Sydney Council (Respondent)

Representation: Counsel:  
F Rourke (Solicitor) (Applicant)  
R White (Respondent)

Solicitors:  
Allens (Applicant)  
HWL Ebsworth Lawyers (Respondent)

File Number(s): 2022/199712

Publication Restriction: Nil

## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal of Development Application DA 58/2022 (the DA) by North Sydney Council (the Respondent). The DA sought consent for the demolition of an existing, 9-storey commercial building and construction of a 37-storey commercial building with 8 basement levels at 107 Mount Street, North Sydney (the site).
- 2 The Court arranged a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 18 October, 2 November, 23 November and 19 December 2022, and 20 February and 3 March 2023. I presided over the conciliation conference.
- 3 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.
- 4 Of particular note, the DA has been amended during the conciliation conference to resolve the contentions initially raised by the Respondent, which related to issues of land owner's consent, inadequate tower setbacks, inadequate street level activation, exceedance of the height of building development standard, and traffic, parking and vehicle access, amongst other contentions.
- 5 The design amendments include changes to the proposed tower form relative to the site boundaries, internal reconfiguration to better activate street level frontages, and refinements to present more animated tower facades to the surrounding streets. Additional design amendments to the roof form mitigate against impacts arising from the height of building exceedance.
- 6 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.

- 7 There are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 8 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. An earlier contention relating to the Respondent's role in providing land owner's consent regarding development proposed for the adjacent lot is resolved by the parties' agreement.
- 9 The DA was publicly notified from 18 March to 15 April 2022. Six unique submissions were received by the Respondent raising concerns for excessive building height, shortcomings in the Applicant's written request seeking to vary the development standard for building height, view loss and overshadowing, noise and vibration during construction, inadequate building setbacks and potential wind effects. The parties agree that the amended DA satisfactorily resolves the matters raised in these submissions. Accordingly, I am satisfied that s 4.15 (1)(d) of the EPA Act has been appropriately addressed.
- 10 The parties agree, and I am satisfied, that the North Sydney Local Environmental Plan 2013 (NSLEP) is the relevant local environmental planning instrument. The site is zoned B3 Commercial Core, and the proposed development - characterised as a commercial building - is permissible with consent, and I am satisfied the proposed development is consistent with the B3 zone objectives set out at cl 2.3 of the NSLEP.
- 11 The parties agree, and I am satisfied, that all principal development standards of the NSLEP have been met by the amended DA, with the exception of cl 4.3, Height of buildings, and cl 6.3, Buildings height and massing, which together establish a maximum height of building development standard of 178m (Reduced Levels (RL)) for the site.
- 12 In such an instance, cl 4.6(3) of the NSLEP requires consideration of a written request from the Applicant demonstrating that compliance with this 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.

- 13 Clause 4.6(4) of the NSLEP requires the consent authority to be satisfied the Applicant's written request has adequately addressed the matters required by cl 4.6(3), and that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard and the objectives for development within the zone in which the development is proposed to be carried out.
- 14 Additionally, cl 4.6(4)(b) of the NSLEP requires the concurrence of the Planning Secretary be obtained, while cl 4.6(5) requires the Planning Secretary to consider whether, in granting this concurrence, the proposed contravention of the development standard raises any matters of significance for State environmental planning, the public benefits of maintaining the standard, and any other matters required to be considered by the Planning Secretary. Given the earlier written advice of the Planning Secretary (in the form of Planning Circular PS 18-003 issued on 21 February 2018), the Court may assume the concurrence of the Planning Secretary in this matter.
- 15 As required by cl 4.6 of the NSLEP, the Applicant has provided a written request (prepared by Ethos Urban and dated 21 February 2023) seeking to vary the height of building development standard.
- 16 The parties agree, and I am satisfied, that this written request adequately justifies the variance to the height of building development standard for the following reasons:
  - (1) The amended DA exceeds the 178m (RL) development standard, proposing a maximum height of 187.7m (RL) which is 9.7m greater than the development standard, or a variation (relative to the existing ground level) of approximately 7%.
  - (2) Of note, the proposed building height and roof form have been amended - consistent with the provisions of cl 6.3 of the NSLEP - to ensure that any private open space or window to a habitable room, located outside the North Sydney Centre, maintains its current extent of direct sunlight between 9am and 3pm on all dates from the March equinox to the September equinox.
  - (3) The objectives of the NSLEP Zone B3 Commercial Core land use zone include providing a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community, encourage appropriate employment opportunities in accessible locations, and maximise public transport

patronage and encourage walking and cycling. I am satisfied the amended DA meets these objectives.

- (4) The objectives of cl 4.3 of the NSLEP include promoting development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient, promoting the retention and sharing of existing views, maintaining solar access to existing dwellings, public reserves and streets, and to promote solar access for future development, and encouraging an appropriate scale and density of development that is in accordance with the character of, an area. I am satisfied the amended DA meets these objectives.
  - (5) The amended DA resolves the Respondent's earlier contentions, and in particular the upper-most roof form of the building has been amended to eliminate any undesirable overshadowing of private spaces outside the North Sydney Centre.
- 17 Consequently, I am satisfied the Applicant's cl 4.6 written request adequately justifies the proposed variation to the height of building development standard and I find to uphold the written request.
- 18 The parties agree, and I am satisfied, that pursuant to cl 5.6 of the NSLEP, Architectural roof features, the amended DA includes a roof feature which:
- (1) Comprises a decorative element on the uppermost portion of the building.
  - (2) Is not an advertising structure.
  - (3) Does not include floor space and is not reasonably capable of modification to include floor space area.
  - (4) Will cause minimal overshadowing.
  - (5) Fully integrates equipment for servicing the building into its design.
- 19 The parties agree, and I am satisfied, that pursuant to cl 6.1 of the NSLEP, Objectives of the Division. The DA as amended, is consistent with the objectives of Division 1 North Sydney Centre, which include maintaining its status as a major commercial centre, maximising commercial floor space and employment growth.
- 20 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. The Applicant has provided a Detailed Site Investigation report dated January 2022 which concludes the site is suitable for the proposed development. Conditions of consent are imposed to ensure

implementation of the recommendations of this report. Accordingly, I am satisfied the DA addresses the matters outlined in s 4.6 of SEPP Resilience.

- 21 The parties agree, and I am satisfied, that State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP Biodiversity) is an additional relevant environmental planning instrument. The Site is situated within the Sydney Harbour Catchment Area and I am satisfied the amended DA will not have any detrimental impact on the character or scenic quality of foreshores and waterways, hence conforming with the relevant provisions of SEPP Biodiversity.
- 22 The parties agree, and I am satisfied, that State Environmental Planning Policy (Planning Systems) 2021 (SEPP Planning Systems) is an additional relevant environmental planning instrument. The DA has an assessed capital investment value of more than \$30 million and consequently is classed as regionally significant development under Sch 6 of SEPP Planning Systems. In its role as the original consent authority, the Sydney North Planning Panel has advised the Respondent it is content for these proceedings to be resolved by s34 agreement.
- 23 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.
- 24 Pursuant to s 2.122 of SEPP Infrastructure, before determining the development application, the consent authority must take into consideration any submission that Transport for NSW provides within 21 days after referral. The Respondent referred the DA to Transport for NSW on 22 March 2022 and no response was received within 21 days. The parties agree, and I am satisfied, that the Applicant's amended Traffic Impact Assessment dated 1 December 2022 demonstrates the proposed development will not adversely affect the surrounding road network or cause any unreasonable or unsafe traffic or parking implications.
- 25 Pursuant to s 2.48 of SEPP Infrastructure, before determining the development application, the consent authority must take into consideration any submission the electricity supply authority provides within 21 days after referral. The

Respondent referred the DA to Ausgrid on 22 March 2022 and received a response on 20 April 2022. The conditions provided by Ausgrid have been incorporated into the agreed conditions of consent.

- 26 Accordingly, I am satisfied the amended DA addresses the relevant matters outlined in SEPP Infrastructure.
- 27 The parties agree, and I am satisfied, that the *Sydney Water Act 1994* applies to aspects of the amended DA. The amended DA seeks consent for diversion of an existing stormwater culvert. As required by s 78(1) of the *Sydney Water Act 1994* the amended DA was referred to Sydney Water on 22 March 2022. A response has been received from Sydney Water and this agency's requirements have been incorporated into the agreed conditions of consent.
- 28 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.
- 29 The Court notes that:
- (1) The Applicant has amended the DA with the agreement of the Respondent.
  - (2) The Applicant has filed the amended DA with the Court on 3 March 2023.

### **Orders**

- 30 The Court orders that:
- (1) Leave is granted to the Applicant to amend Development Application DA 58/2022 and rely upon the amended plans and documents referred to at Condition 1 of Annexure A.
  - (2) Pursuant to section 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 amending the Development Application in the agreed sum of \$35,000 within 28 days of the date of these orders.
  - (3) The Applicant's written request, pursuant to clause 4.6 of the North Sydney Local Environmental Plan 2013 (NSLEP), seeking to vary the development standard for height of building as set out at clause 4.3 of the NSLEP, is upheld.
  - (4) The appeal is upheld.



- (5) Consent is granted to Development Application DA 58/2022 (as amended) for demolition of existing commercial office building, excavation to accommodate 8 basement levels, construction of a new 37-storey commercial tower, planting of 2 additional street trees, and augmentation and diversion of existing utilities infrastructure at 107 Mount Street, North Sydney, subject to the conditions of consent at Annexure A.

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Annexure A

Architectural Plans

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.