



Land and Environment Court
New South Wales

Case Name: GPT Funds Management Limited v North Sydney Council

Medium Neutral Citation: [2024] NSWLEC 1498

Hearing Date(s): Conciliation conference held 8 April, 6 May, 22 May, 6 June, 11 July and 30 July 2024

Date of Orders: 16 August 2024

Decision Date: 16 August 2024

Jurisdiction: Class 1

Before: Pullinger AC

Decision: The Court orders that:

- (1) Leave is granted to the Applicant to amend Development Application DA393/22 and rely upon the amended plans and documents referred to in Condition 1 at Annexure A.
- (2) 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 amending the Development Application in the agreed sum of \$18,000.
- (3) The Applicant's written request, pursuant to cl 4.6 of the North Sydney Local Environmental Plan 2013 (NSLEP), seeking to vary the development standard for height of buildings as set out at cll 4.3 and 4.3A of the NSLEP, is upheld.
- (4) The appeal is upheld.
- (5) Consent is granted to Development Application DA393/22 (as amended) for demolition of two office buildings and associated works and removal of trees, and construction of a 43-storey commercial building including a five-level basement with parking and associated works at 153-157 Walker 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

Environmental Planning and Assessment Regulation 2021, ss, 37, 38
State Environmental Planning Policy (Biodiversity and Conservation) 2021, Ch 2
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
State Environmental Planning Policy (Transport and Infrastructure) 2021, s 2.119
North Sydney Local Environmental Plan 2013, cl 2.3, 2.7, 4.3, 4.3A, 4.6, 6.1, 6.3

Texts Cited: NSW Department of Planning and Environment, Planning Circular PS 20-002, May 2020

Category: Principal judgment

Parties: GPT Funds Management Limited (Applicant)
North Sydney Council (Respondent)

Representation: Counsel:
S Hanscomb (Applicant)
A Guy (Solicitor) (Respondent)

Solicitors:
King and Wood Mallesons (Applicant)
Sparke Helmore Lawyers (Respondent)

File Number(s): 2023/291524

Publication Restriction: Nil

JUDGMENT

1 **COMMISSIONER:** This is an appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act), brought by GPT Funds

Management Limited (the Applicant), against the deemed refusal of Development Application DA393/22 (the DA) by North Sydney Council (the Respondent). At the date of its lodgement on 16 December 2022, the DA sought consent for the demolition of two office buildings and associated works and removal of trees, and construction of a 43-storey commercial building including a five-level basement with parking and associated works, at 153-157 Walker 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 8 April, 6 May, 22 May, 6 June, 11 July and 30 July 2024. 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 proposal has been amended by agreement between the parties to resolve the contentions initially raised by the Respondent. These contentions included issues of inappropriate building bulk, scale and character, inconsistency with the relevant land use zone objectives set out within the North Sydney Local Environmental Plan 2013 (NSLEP), exceedance of the relevant building height control, and a range of deficiencies related to building setbacks, a proposed through site link, the nature and scale of proposed retail units, desired future character and streetscape character, amongst other contentions.
- 5 Agreed design amendments have been made to improve the DA's relationship to the site, its context and the desired future character of this part of the North Sydney CBD, increasing setbacks to adjacent streets, the introduction of a defined podium form and the omission of the earlier proposed through site link in favour of a more controlled dual lobby arrangement linking between Walker Street and Little Walker Street. Changes have been made to improve the presentation of ground level uses to the adjacent public domain and to minimise service and vehicle access impacts. These agreed amendments also

have the effect of reducing impacts associated with the scale and mass of the proposed building.

- 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.
- 9 The DA was publicly notified from 3 March to 24 March 2022. A total of three submissions were received by the Respondent raising concerns for over-development in the locality, cumulative amenity impacts of this and other development proposals, view loss, traffic generation and congestion, adequacy of stormwater infrastructure and potential flooding impacts, potential impacts on the land at 161 and 165 Walker Street, including its redevelopment potential being unreasonably constrained by the proposed zero setback. The parties agree, and I am satisfied, that the amended DA and conditions of consent now satisfactorily address the matters raised in these public 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 NSLEP is the relevant local environmental planning instrument. The site is zoned E2 Commercial Centre and the amended DA, comprising commercial offices and ground level retail uses - characterised as commercial premises - is permissible with consent within the E2 zone.
- 11 The parties agree, and I am satisfied, that pursuant to cl 2.3 of the NSLEP, the amended DA is consistent with the E2 Commercial Centre zone objectives, which include:

- To strengthen the role of the commercial centre as the centre of business, retail, community and cultural activity.
 - To encourage investment in commercial development that generates employment opportunities and economic growth.
 - To encourage development that has a high level of accessibility and amenity, particularly for pedestrians.
 - To enable residential development only if it is consistent with the Council's strategic planning for residential development in the area.
 - To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.
 - To minimise the adverse effects of development on residents and occupiers of existing and new development.
- 12 The parties agree, and I am satisfied, that pursuant to cl 2.7 of the NSLEP, demolition of existing structures is permissible with consent.
- 13 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 4.3A - Exceptions to height of buildings.
- 14 In such an instance, cl 4.6(3) of the NSLEP requires consideration of a written request from the Applicant demonstrating that compliance with the 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.
- 15 Clause 4.6(4) of the NSLEP requires the consent authority to be satisfied that 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.
- 16 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 20-002 issued on 5 May 2020), the Court may assume the concurrence of the Planning Secretary in this matter.

- 17 As required by cl 4.6 of the NSLEP, the Applicant has provided a written request seeking to vary the height of buildings development standard, prepared by Ethos Urban and dated 19 June 2024.
- 18 The amended DA proposes a maximum building height of RL234, exceeding the relevant height of building development standard of RL215 by 19m and representing a variation of approximately 12% (when accounting for the existing ground level evident on the site).
- 19 The parties agree, and I am satisfied, that the written request adequately justifies the proposed variance to the height of buildings development standard for the following reasons:
 - (1) The amended DA achieves the objectives of the height of building development standard and E2 Commercial Centre land use zone despite the non-compliance.
 - (2) The amended DA is agreed to be an appropriate form and scale that is compatible with the existing streetscape and desired future character of the North Sydney CBD.
 - (3) The proposed height exceedance allows the amended DA to incorporate an architectural roof feature that responds to site topography whilst maximising commercial floor space capacity pursuant to cl 6.1(b) of the NSLEP.
 - (4) The proposed height exceedance does not give rise to unreasonable adverse visual impacts or disruption to views from neighbouring properties.
 - (5) The proposed height exceedance does not give rise to unreasonable adverse overshadowing impacts to surrounding uses and areas based on the solar access framework established for the North Sydney Centre pursuant to cl 6.3 of the NSLEP.
 - (6) The proposed height exceedance does not give rise to unreasonable adverse privacy impacts given its substantial separation from residential development.
 - (7) The amended DA provides a resolved built form that is consistent with the North Sydney CDB skyline and involves building heights stepping down from elevated topography.

- (8) The objectives of the NSLEP E2 Commercial Centre land use zone include to strengthen the role of the commercial centre as the centre of business, retail, community and cultural activity; to encourage investment in commercial development that generates employment opportunities and economic growth; to encourage development that has a high level of accessibility and amenity, particularly for pedestrians; to ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces; and to minimise the adverse effects of development on residents and occupiers of existing and new development. I am satisfied the amended DA is consistent with these objectives.
- (9) The objectives of cl 4.3 of the NSLEP include to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient; to promote the retention and, if appropriate, sharing of existing views; to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development; and to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area. I am satisfied the amended DA meets these objectives.
- 20 Consequently, I am satisfied the Applicant's cl 4.6 written request adequately justifies the proposed variation to the height of buildings development standard, and I find to uphold the written request.
- 21 The parties agree, and I am satisfied, that pursuant to cl 6.3 of the NSLEP - Building heights and massing - the amended DA does not result in a net increase in overshadowing between 12pm and 2pm from the March equinox to the September equinox upon land identified within the North Sydney Centre RE1 Public Recreation land use zone, or identified as a 'Special Area' on the North Sydney Centre Map, or on the Don Bank Museum.
- 22 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. The site does not have frontage to any classified road and accordingly s 2.119 of SEPP Infrastructure is not enlivened by the amended DA.
- 23 The parties agree, and I am satisfied, that State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience and Hazards) is an additional relevant environmental planning instrument. The Applicant has provided a Detailed Site Investigation prepared by Douglas Partners dated 9

December 2022. This report makes recommendations for works to occur to make the site suitable for its intended purpose. Agreed conditions of consent reflecting the recommendations of the report are imposed. Accordingly, I am satisfied the amended DA addresses those matters outlined in s 4.6 of SEPP Resilience and Hazards.

- 24 The parties agree, and I am satisfied, that State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP BC) is an additional relevant environmental planning instrument.
- 25 Chapter 2 of SEPP BC deals with clearing of vegetation in non-rural areas. The parties agree and I am satisfied, that the amended DA proposes the removal of trees and is not inconsistent with the provisions of Ch 2 of SEPP BC.
- 26 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.
- 27 The Court notes that:
 - (1) Pursuant to ss 37 and 38 of the Environmental Planning and Assessment Regulation 2021, the Applicant has amended the DA with the approval of the Respondent.
 - (2) The Applicant has lodged the amended DA with the Court on 30 July 2024.

Orders

- 28 The Court orders that:
 - (1) Leave is granted to the Applicant to amend Development Application DA393/22 and rely upon the amended plans and documents referred to in Condition 1 at Annexure A.
 - (2) 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 amending the Development Application in the agreed sum of \$18,000.
 - (3) The Applicant's written request, pursuant to cl 4.6 of the North Sydney Local Environmental Plan 2013 (NSLEP), seeking to vary the development standard for height of buildings as set out at cll 4.3 and 4.3A of the NSLEP, is upheld.
 - (4) The appeal is upheld.

- (5) Consent is granted to Development Application DA393/22 (as amended) for demolition of two office buildings and associated works and removal of trees, and construction of a 43-storey commercial building including a five-level basement with parking and associated works at 153-157 Walker Street North Sydney, subject to the conditions of consent at Annexure A.

M Pullinger

Acting Commissioner of the Court

Annexure A

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.