



Land and Environment Court
New South Wales

Case Name:	Silvernlight (Crows Nest) Landowner Pty Ltd v North Sydney Council
Medium Neutral Citation:	[2024] NSWLEC 1661
Hearing Date(s):	Conciliation conference held 2 April, 29 April, 10 May and 27 September 2024
Date of Orders:	22 October 2024
Decision Date:	22 October 2024
Jurisdiction:	Class 1
Before:	Pullinger AC
Decision:	<p>The Court orders that:</p> <p>(1) 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 cl 4.3 of the NSLEP, is upheld.</p> <p>(2) The appeal is upheld.</p> <p>(3) Consent is granted to Development Application DA193/23 for the demolition of existing structures and construction of a mixed use building including basement parking and landscaping at 270-272 Pacific Highway, Crows Nest, subject to the conditions of consent at Annexure A.</p>
Catchwords:	DEVELOPMENT APPLICATION – mixed commercial office building – cl 4.6 written request – height of buildings – agreement between the parties – orders
Legislation Cited:	<p>Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7</p> <p>Land and Environment Court Act 1979, s 34</p> <p>North Sydney Local Environmental Plan 2013, cll 2.3,</p>

2.7, 4.3, 4.6, 5.6, 5.10, 6.10

State Environmental Planning Policy (Biodiversity and Conservation) 2021, Chs 2, 6, ss 6.6, 6.7, 6.8, 6.9, Pt 6.2, Div 2

State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6

State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.119, 2.121, 2.122

Texts Cited:	NSW Department of Planning and Environment, Planning Circular PS 20-002, May 2020
Category:	Principal judgment
Parties:	Silvernight (Crows Nest) Landowner Pty Ltd (Applicant) North Sydney Council (Respondent)
Representation:	Counsel: A Gadiel (Solicitor) (Applicant) A Pickles SC (Respondent) Solicitors: Mills Oakley (Applicant) Hall and Wilcox (Respondent)
File Number(s):	2023/284108
Publication Restriction:	Nil

JUDGMENT

- COMMISSIONER:** This is an appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act), brought by Silvernight (Crows Nest) Landowner Pty Ltd (the Applicant), against the deemed refusal of Development Application DA193/23 (the DA) by North Sydney Council (the Respondent). At the date of its lodgement on 30 June 2023, the DA sought consent for the demolition of two existing five-storey commercial buildings and the construction of a thirteen-storey commercial building, including retails uses at ground floor, basement parking and landscaping, at 270-272 Pacific Highway, Crows Nest (the site).
- 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

2 April, 29 April, 10 May and 27 September 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.
- 5 These contentions included issues of exceedance of the development standards for floor space ratio and building height, inappropriate urban design interface with nearby residential development in Sinclair Street, and concerns for traffic, access and parking, amongst other contentions.
- 6 Agreed design amendments have been made to improve the DA's relationship to the site, its context and to the desired future character of this part of Crows Nest, redistributing the proposed building mass across the site in order to reduce impacts upon the more sensitive residential dwellings of Sinclair Street.
- 7 More specifically, changes have been made to reduce the apparent building height to the south and the west, whilst also improving the presentation of the proposed building to the Pacific Highway. These agreed amendments also have the effect of reducing overshadowing impacts associated with the scale and mass of the proposed building.
- 8 Of further note, earlier during the conciliation conference, the Respondent indicated that in order to reach formal agreement, public re-notification of the amended proposal would be required, along with time for a more detailed assessment of the Applicant's amended scheme. The time anticipated to complete these steps was of the order of six weeks. Given the protracted nature of these tasks, and at the request of the Respondent, I terminated the conciliation conference on 10 May 2024 with the parties returning to the Registrar for further directions.

- 9 Subsequently, the parties have completed the steps noted above, and the Registrar has granted leave to the Applicant to amend the DA and dealt with the matter of costs thrown away.
- 10 The Chief Judge has now reallocated the matter to me, once again within the conciliation conference phase, and the parties have formalised their s34 agreement on 27 September 2024.
- 11 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.
- 12 There are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 13 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.
- 14 The DA was publicly notified from 14 July 2023 to 11 August 2023. A total of thirty-two submissions were received by the Respondent, which raised concerns including the following issues:
- (1) Traffic congestion and increases to traffic generation and potential vehicular and pedestrian safety issues.
 - (2) Uncharacteristic building height given Crows Nest's unique village-like character.
 - (3) Loss of solar access.
 - (4) Undesirable precedent for large scale development.
 - (5) Construction phase impacts of access, noise and dust.
 - (6) Potential construction phase impacts on structural adequacy of nearby properties.
 - (7) Wind effects.
 - (8) Loss of privacy and cross viewing impacts.
 - (9) Loss of views and outlook.
 - (10) Impacts on the adjoining heritage item.
 - (11) Close proximity of proposed development to the site's rear boundary.

- (12) Negative impacts on nearby property values.
 - (13) Car parking exceeding the maximum parking rates.
 - (14) Lack of setback to the northern boundary for the future mixed use development at 290 Pacific Highway.
- 15 The amended DA was re-notified between 21 June 2024 and 5 July 2024. A total of five further submissions were received by the Respondent re-stating similar concerns to those listed above.
- 16 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.
- 17 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 MU1 Mixed Use and the amended DA, comprising commercial offices and ground level retail uses and medical centre - characterised as commercial premises - is permissible with consent within the MU1 zone.
- 18 The parties agree, and I am satisfied, that pursuant to cl 2.3 of the NSLEP, the amended DA is consistent with the MU1 Mixed Use zone objectives, which include:
- To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.
 - 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 conflict between land uses within this zone and land uses within adjoining zones.
 - To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.
 - To create interesting and vibrant mixed use centres with safe, high quality urban environments with residential amenity.
- ...
- 19 The parties agree, and I am satisfied, that pursuant to cl 2.7 of the NSLEP, demolition of existing structures is permissible with consent.

- 20 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.
- 21 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.
- 22 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.
- 23 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.
- 24 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 Keylan and dated 13 June 2024.
- 25 The amended DA proposes a maximum building height of 60.39m (including an architectural roof feature) or 58.12m (excluding this feature), exceeding the relevant height of building development standard of 54m by up to 6.39m, representing a variation of approximately 12% when measured from the existing ground level evident on the site today - specifically, the existing lowest basement level.

26 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) Clause 5.6 of the NSLEP - Architectural roof features - provides a statutory framework allowing specific portions of a proposed development to exceed the development standard for height of buildings.
- (2) In this instance, the amended DA provides an architectural roof feature meeting the objectives and specified parameters set out at cl 5.6 of the NSLEP.
- (3) Accounting for the architectural roof feature and the natural ground level across the site rather than the existing lowest basement level, the amended DA exceeds the height of building development standard by a more modest 0.76m.
- (4) The amended DA is agreed to achieve the objectives of the height of building development standard and MU1 Mixed Use land use zone despite the non-compliance.
- (5) The amended DA is agreed to be an appropriate form and scale that is compatible with the existing streetscape and desired future character of this part of Crows Nest.
- (6) The proposed height exceedance does not give rise to unreasonable additional visual impacts or disruption to views from neighbouring properties.
- (7) The proposed height exceedance does not give rise to unreasonable additional adverse overshadowing impacts upon surrounding uses and areas.
- (8) The amended DA provides a resolved built form, incorporating an architectural roof feature, that is consistent with the Crows Nest skyline and involves building heights stepping down towards more sensitive low-scale neighbouring properties.
- (9) The objectives of the MU1 Mixed Use land use zone include to encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities; 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 conflict between land uses within this zone and land uses within adjoining zones; to encourage business, retail, community and other non-residential land uses on the ground floor of buildings; and to create interesting and vibrant mixed use centres with safe, high quality urban environments with residential amenity. I am satisfied the amended DA is consistent with these objectives.

- (10) 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.
- 27 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.
- 28 The parties agree, and I am satisfied, that pursuant to cl 5.10 of the NSLEP - Heritage conservation - the site is not heritage listed, nor is it situated within a Heritage Conservation Area. However, the site is within proximity of a number of listed heritage items. Accordingly, the Applicant has provided a Heritage Impact Statement, which concludes the amended DA is acceptable, conserving the environmental heritage of North Sydney and bringing no unreasonable impacts upon nearby heritage items.
- 29 The parties agree, and I am satisfied, that pursuant to cl 6.10 of the NSLEP - Earthworks - the DA proposes excavation and earthworks forming a matter for consideration. The Applicant has provided a Geotechnical Desktop Assessment prepared by Douglas Partners and dated 13 June 2024, which provides recommendations relevant to earthworks, vibration during excavation, excavation support and foundation design. Agreed conditions of consent are imposed reflecting the recommendations of this report.
- 30 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.
- 31 The site has frontage to a classified road (the Pacific Highway) and accordingly s 2.119 of SEPP Infrastructure is enlivened by the amended DA. Vehicular access to the site is provided from Bruce Street. The parties agree, and I am satisfied, that the safety, efficiency and operation of the Pacific Highway will not be adversely affected by the amended DA.

- 32 The amended DA proposes excavation to a depth of at least 3 metres adjacent to the Pacific Highway, enlivening s 2.121 of SEPP Infrastructure. Transport for NSW (TfNSW) has been consulted as required by s 2.121 and TfNSW has provided its response, which is now reflected in agreed conditions of consent.
- 33 The amended DA is classified as traffic generating development given the commercial accommodation it proposes. Pursuant to s 2.122 of SEPP Infrastructure, the parties agree, and I am satisfied that the amended DA appropriately addresses the response received from TfNSW, the efficiency of movement of people and freight to and from the site and the extent of multi-purpose trips, the potential to minimise the need for travel by car and to maximise movement of freight in containers of bulk freight by rail, and any potential traffic safety, road congestion or parking implications of the development.
- 34 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 Preliminary Site Investigation (Contamination) prepared by Douglas Partners and dated 13 June 2024. 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.
- 35 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.
- 36 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 is consistent with the provisions of Ch 2 of SEPP BC.
- 37 Chapter 6 of SEPP BC deals with water catchments. The parties agree and I am satisfied, the site is within the regulated catchment of Sydney Harbour. The amended DA is designed to ensure the quality of water entering a natural waterbody will not give rise to unreasonable impacts, will not unreasonably

impact upon animals or vegetation, will minimise erosion and sedimentation, will not impact upon public access to the foreshore, and will not create adverse impacts on adjacent or downstream local government areas. Accordingly, I am satisfied that those matters set out at ss 6.6, 6.7, 6.8 and 6.9 of Pt 6.2, Div 2 of SEPP BC have been appropriately addressed.

38 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.

39 The Court notes that:

- (1) The Applicant has lodged the amended DA with the Court on 27 September 2024.

Orders

40 The Court orders that:

- (1) 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 cl 4.3 of the NSLEP, is upheld.
- (2) The appeal is upheld.
- (3) Consent is granted to Development Application DA193/23 for the demolition of existing structures and construction of a mixed use building including basement parking and landscaping at 270-272 Pacific Highway, Crows Nest, subject to the conditions of consent at Annexure A.

M Pullinger

Acting Commissioner of the Court

Annexure A

Architectural plans Part1

Architectural plans Part2

Architectural plans Part3

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