



Land and Environment Court New South Wales

Medium Neutral Citation:	Freecity Macpark Development Pty Ltd v Council of the City of Ryde [2025] NSWLEC 1025
Hearing dates:	Conciliation conference on 27 August, 12 September and 15 November 2024
Date of orders:	22 January 2025
Decision date:	22 January 2025
Jurisdiction:	Class 1
Before:	Miller AC
Decision:	<p>The Court orders that:</p> <ol style="list-style-type: none">(1) The appeal is upheld.(2) The Applicant's written request pursuant to clause 4.6 of the Ryde Local Environmental Plan 2014 seeking a contravention of the height of building development standard set out in clause 4.3 is upheld.(3) The Applicant's written request under clause 4.6 of the Ryde Local Environmental Plan 2014 seeking a contravention of the non-discretionary car parking development standard set out in clause 68(2)(e) of State Environmental Planning Policy (Housing) 2021 is upheld.(4) Development consent is granted to development application LDA2023/0320, as amended, for demolition of existing buildings and construction of a 19-storey co-living and student accommodation development, comprising 507 rooms with 2 basement levels and associated landscaping and works at 169-171 Herring Road, Macquarie Park, subject to the conditions in the annexure marked A.(5) The Applicant is to pay the Respondent's costs thrown away by the amendment of the Development Application, pursuant to s 8.15(3) of the

Environmental Planning and Assessment Act 1979,
as assessed or agreed within 28 days of the date of
these orders.

Catchwords:	APPEAL – co-living and student accommodation – conciliation conference – agreement reached – orders made
Legislation Cited:	<i>Environmental Planning and Assessment Act 1979</i> , 4.15, 4.16, 8.7, 8.15 <i>Land and Environment Court Act 1979</i> , s 34 Environmental Planning and Assessment Regulation 2021, ss 37, 38, Sch 7 Ryde Local Environmental Plan 2014, cll 2.7, 4.3, 4.4, 4.6, 6.2, 6.4, 6.6 State Environmental Planning Policy (Biodiversity and Conservation) 2021, Chs 2, 6, ss 2.6, 6.6, 6.7, 6.9 State Environmental Planning Policy (Housing) 2021, Ch 3, Pt 3, ss 68, 69 State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6 State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.119, 2.122
Texts Cited:	NSW Department of Planning and Environment, Apartment Design Guide, July 2015
Category:	Principal judgment
Parties:	Freecity Macpark Development Pty Ltd (Applicant) Council of the City of Ryde (Respondent)
Representation:	Counsel: A Whealy (Solicitor) (Applicant) M Challari (Solicitor) (Respondent) Solicitors: Mills Oakley (Applicant) Council of the City of Ryde (Respondent)
File Number(s):	2024/54712
Publication restriction:	Nil

JUDGMENT

- COMMISSIONER:** This appeal concerns a development application for the demolition of existing buildings and construction of a 19-storey co-living and student accommodation development, comprising 507 rooms with 2 basement levels and

associated landscaping and works at 169-171 Herring Road, Macquarie Park. The Applicant lodged an appeal on 12 February 2024 pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal of the subject development application. In exercising the functions of the consent authority on appeal, the Court has the power to determine the development application pursuant to ss 4.15 and 4.16 of the EPA Act. The final orders in this appeal, outlined in [10] below, are made as a result of an agreement between the parties that was reached at a conciliation conference.

- 2 The Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 27 August, 12 September and 15 November 2024, and which I presided over.
- 3 At the conciliation conference, an agreement under s 34(3) of the LEC Act was reached between the parties as to the terms of a decision in the proceedings that was acceptable to the parties. The agreement was recorded in a signed agreement filed on 22 November 2024.
- 4 The agreement follows the Council's approval of an application for an amendment to the development application pursuant to ss 37 and 38 of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation). Amendments to the plans were made to address the contentions identified by the Respondent.
- 5 The decision agreed upon is for the grant of development consent subject to conditions of consent pursuant to s 4.16(1) of the EPA Act. The signed agreement is supported by an Agreed Statement of Jurisdictional Prerequisites (Agreed Statement), which sets out the jurisdictional requirements for the making of orders in accordance with the agreement. I have considered the contents of the Agreed Statement, together with the documents referred to therein, the Class 1 application and its attachments, and the documents that are referred to in condition 1. Based on those documents, I have considered the matters required to be considered pursuant to s 4.15(1) of the EPA Act.
- 6 As the presiding Commissioner I am satisfied that the decision to grant development consent to the amended application, subject to conditions of consent, is a decision that the Court could have made in the proper exercise of its functions, this being the test applied by s 34(3) of the LEC Act. I formed this state of satisfaction as each of the jurisdictional preconditions identified by the parties is met, for the following reasons:
 - (1) I am satisfied that consent should be granted notwithstanding the contravention of the height development standard. The development standard establishes a maximum height of building of 65m pursuant to cl 4.3 of the Ryde Local Environmental Plan 2014 (RLEP). The proposed maximum height of 67.9m represents a contravention of 2.9m above the numerical standard (11.5% exceedance). This contravention arises primarily from a change in ground levels across the site and the inclusion of additional plant areas and does not give rise to any adverse impacts. The height non-compliance is generally limited to a

small area of plant and lift overrun centrally located on the top of the building. Having regard to these and the other circumstances of the case I am satisfied that:

- (a) The written request dated 14 August 2024, lodged pursuant to cl 4.6 of the RLEP, adequately establishes sufficient environmental planning grounds that justify the breach in the height of building development standard.
 - (b) The written request demonstrates that compliance with the standard is unreasonable and unnecessary in the circumstances of the case given that the proposal achieves the objectives of the standard notwithstanding the non-compliance and that it will not result in any adverse impacts.
 - (c) Based on the content of the written request and the parties' agreement, the proposal is in the public interest because it is consistent with the objectives of the zone and of the development standard.
- (2) I am also satisfied that consent should be granted notwithstanding the contravention of the non-discretionary development standard in respect of car parking. The non-discretionary development standard establishes a minimum car parking provision for the proposed development of 101 spaces pursuant to s 68(2)(e) of State Environmental Planning Policy (Housing) 2021 (Housing SEPP). The proposal provides for a total of 44 car parking spaces therefore resulting in a shortfall of 57 spaces thereby being a contravention of 56.44%. This contravention is argued to be acceptable given the proposed student accommodation use, proximity to Macquarie University (which is within walking distance) and the proximity to the metro station (within 800m walking distance). Having regard to these and the other circumstances of the case I am satisfied that:
- (a) The written request dated 13 August 2024, lodged pursuant to cl 4.6 of the RLEP, adequately establishes sufficient environmental planning grounds that justify the breach in the car parking non-discretionary development standard.
 - (b) The written request demonstrates that compliance with the standard is unreasonable and unnecessary in the circumstances of the case given that the proposal achieves the objectives of the standard notwithstanding the non-compliance and that it will not result in any adverse impacts.
 - (c) Based on the content of the written request and the parties' agreement, the proposal is in the public interest because it is consistent with the objectives of the zone and of the development standard.
- (3) The site is zoned MU1 Mixed Use under RLEP. Development for the purposes of co-living housing is permissible with consent in the MU1 zone under the RLEP. Further, regard has been had to the zone objectives and the proposal is

considered to be consistent with those objectives.

- (4) In accordance with cl 2.7 of RLEP consent is sought for the demolition of an existing building on site.
- (5) The proposed development complies with the maximum floor space ratio (FSR) development standard (maximum proposed FSR of 4.93:1 where a maximum of 4.95:1 applies) in accordance with cl 4.4 of RLEP and s 68(2)(a) of the Housing SEPP (a 10% bonus is allowable).
- (6) The proposed development includes earthworks for the construction of the proposed basement levels, lower ground level and services such that cl 6.2 of the RLEP applies. Based on the Preliminary Geotechnical and Hydrogeological Assessment Report (prepared by Martens dated 26 October 2023), the Stormwater Management Report and Plans (prepared by Martens, 20 October 2023) and the recommended conditions of consent, I have considered the matters set out in cl 6.2 of the RLEP.
- (7) I am satisfied that the proposal complies with cl 6.4 of RLEP in respect of stormwater management having regard to the proposed plans (which include an onsite detention (OSD) tank), the Stormwater Management Report and Plans (prepared by Martens, 20 October 2023) and recommended conditions of consent.
- (8) Clause 6.6 of the RLEP relates to environmental sustainability and requires satisfaction that a development has had regard to the environmentally sensitive matters as specified. Having regard to the Environmentally Sustainable Design report (prepared by Steensen Varming dated October 2023) I am satisfied that the proposal incorporates sustainable practices in the building design. I note conditions are also included in this respect.
- (9) Consideration has been given as to whether the subject site is contaminated as required by s 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (RH SEPP). A Detailed Site Investigation (prepared by Martens dated 12 August 2024) and Remediation Action Plan (prepared by Martens dated 2 September 2024) have been prepared which confirm, as required by the SEPP, that the site can and will be made suitable for the proposed development having regard to the recommended conditions of consent.
- (10) The provisions of Pt 3 Ch 3 of the Housing SEPP apply to the development. At s 69, consent cannot be granted unless certain requirements are met concerning room sizes, lot size, a manager's workspace, adequate bathroom/laundry/kitchen facilities, and bicycle and motorcycle spaces. Based

- on the Agreed Statement and on the architectural plans and conditions of consent, I am satisfied that each of the matters in s 69(1) of the Housing SEPP are met by the proposed development.
- (11) Further, consistent with s 69(2) of the Housing SEPP, and based on the Agreed Statement and the architectural plans, I have considered whether the building will comply with the minimum separation distances outlined in the Apartment Design Guide, whether the communal living area receives 3 hours of direct solar access, and whether the design of the building will be compatible with the desired elements of the character of the local area or the desired future character of the area.
- (12) I note also that s 68 of the Housing SEPP sets out a number of grounds on which consent cannot be refused if certain criteria is met. The proposed development meets the criteria for FSR, the size and dimensions of the communal living area, the size and dimensions of the communal open spaces, and landscaping requirements. Accordingly, consent cannot be refused on any of those grounds. The application does not comply with the minimum requirement for car parking and in this respect a cl 4.6 variation request has been submitted which I consider is justified in the circumstances as outlined at [6(2)] above. In respect of the other matters on the basis of the parties' agreement I am satisfied that the proposal complies.
- (13) The proposed development has frontage to a classified road (Herring Road) and accordingly s 2.119 of State Environmental Planning Policy (Transport and Infrastructure) 2021 (TI SEPP) applies. In satisfaction of the requirement the Transport Assessment Report submitted confirms that the proposal will have minimal impact to safety, efficiency and the ongoing operation of the classified road. Further s 2.122 of the TI SEPP requires that Transport for NSW (TfNSW) be provided written notice of the application given the size of the development and the access to the classified road. TfNSW was notified of the application and provided comments by letter dated 29 January 2024 which have been included in the conditions of consent. I am therefore satisfied in respect of the relevant matters.
- (14) The proposal includes the removal of 16 trees from the site therefore Ch 2 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (BC SEPP) applies. The proposal is consistent with s 2.6 as consent is sought for tree removal and the impact has been found to be acceptable having regard to the Arboricultural Impact Assessment (prepared by Bluegum Tree Care and Consultancy dated May 2024) and proposed replacement planting as required by the plans and the agreed conditions of consent.
- (15) The site is in the Sydney Harbour Catchment, and therefore Ch 6 of the BC SEPP applies. Based on the submitted Hydrogeology Assessment (prepared by Martens dated 26 October 2023), Stormwater Management Plan and Civil and Stormwater Plans (prepared by Martens dated 20 October 2023), I am satisfied

of the matters in ss 6.6(2) and 6.7(2). Further, the development will not change any public access to recreational areas or waterbodies, and I am therefore satisfied of the matters in s 6.9(2).

- (16) The parties agree that the development is not a BASIX Building within the meaning of Sch 7 of the EPA Regulation and therefore a BASIX certificate is not required.
- (17) The development application was notified between 10 and 24 January 2024 and no submissions were received. Further Council has advised that the amendments to the plans do not give rise to any additional impacts that would warrant renotification.

7 Having reached the state of satisfaction that the decision is one that the Court could have made in the exercise of its functions, s 34(3)(a) of the LEC Act requires me to “dispose of the proceedings in accordance with the decision”. The LEC Act also requires me to “set out in writing the terms of the decision” (s 34(3)(b)).

8 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, any evaluative judgment on the matters that were originally in dispute between the parties, or any assessment of the merits of the development application against the discretionary matters that arise pursuant to an assessment under s 4.15 of the EPA Act.

9 The Court notes:

- (1) The Respondent, as the relevant consent authority, has approved under section 38(1) of the Environmental Planning and Assessment Regulation 2021, the Applicant amending Development Application No LDA2023/0320 in accordance with the following amended plans (Amended Development Application) which have been filed with the Court on 11 November 2024:

TAB	DOCUMENT	DATE
1.	<p>Amended Architectural Plans (Rev C) prepared by Cox Architects</p> <ul style="list-style-type: none"> • A-DA-0100 – Cover Sheet – Drawings Index • A-DA-0101 – Development summary • A-DA-1100 – Existing Site Plan • A-DA-1101 – Site Analysis Plan • A-DA-1103 – Demolition Plan • A-DA-2100 – Basement 2 Plan • A-DA-2101 – Basement 1 Plan • A-DA-2102 – Lower Ground Floor Plan • A-DA-2103 – Ground Floor Plan • A-DA-2104 – Level 1 Plan • A-DA-2105 – Level 2-14 Plan • A-DA-2106 – Level 15 Plan • A-DA-2107 – Level 16-18 Plan • A-DA-2108 – Roof Plan • A-DA-3000 – Elevations – East & North • A-DA-3001 – Elevations – South & West • A-DA-4000 – Section A • A-DA-4001 – Section B • A-DA-4002 - Car Park Ramp Sections • A-DA-5000 – Plans – Unit Layouts • A-DA-8000 – Shadow Diagrams • A-DA-8001 – Deep Soil • A-DA-9000 – Development Calculation Plan 	24 September 2024
2.	Clause 4.6 variation request – Car Parking, prepared by Ethos Urban	13 August 2024
3.	Clause 4.6 variation request – Height of Buildings, prepared by Ethos Urban	13 August 2024

TAB	DOCUMENT	DATE
4.	Statutory Compliance Assessment, prepared by Ethos Urban	13 August 2024
5.	Plan of Management, prepared by Unilodge	September 2023
6.	Statement of Changes, prepared by Unilodge	19 July 2024
7.	Sample Resident Pack, prepared by Unilodge	-
8.	Detailed Site Investigation Report, prepared by Martens	August 2024
9.	Hazardous Materials Management Pre-Demolition Survey and Register, prepared by EHO Consulting	17 May 2024
10.	Construction Traffic Management Plan, prepared by SBMG Planning	15 May 2024
11.	Waste Management Report, prepared by Elephant's Foot Consulting	25 September 2024
12.	Remedial Action Plan, prepared by Martens	2 September 2024
13.	<p>Civil and stormwater material:</p> <ul style="list-style-type: none"> • Existing stormwater structural inspection report prepared by 1 CCTV – 13 May 2024 • Existing stormwater videos x 3 (Provided on USB) • Stormwater Works Within Easement Statement, prepared by TTW – 1 August 2024 • Stormwater Investigation (Rev A), prepared by ISA Surveyors – 14 May 2024 • Sheet 1 of 2 • Sheet 2 of 2 	-
14.	Acoustic Assessment Report, prepared by PWNA	25 July 2024

TAB	DOCUMENT	DATE
15.	Revised Landscape Plan (Up to Rev 4), prepared by NBRS <ul style="list-style-type: none"> • LDA-0001 Cover Page (Rev 4) • LDA-0010 Landscape Principles (Rev 3) • LDA-0020 Spatial Zoning - Lower Ground & Ground (Rev 3) • LDA-0021 Spatial Zoning - Level 15 (Rev 3) • LDA-0030 Tree Management Plan (Rev 4) • LDA-0040 Deep Soil Plan (Rev 3) • LDA-1000 Landscape Masterplan (Rev 3) • LDA-2000 Detail Plan - Public Domain (Rev 3) • LDA-2100 Detail Plan - Lower Ground (Rev 3) • LDA-2200 Detail Plan - Ground (Rev 3) • LDA-2300 Detail Plan - Level 1 (Rev 3) • LDA-2400 Detail Plan - Level 15 (Rev 3) • LDA-3000 Plant Schedules & Palette (Rev 3) • LDA-3100 Planting Plan - Ground Floor Proposed Trees (Rev 3) • LDA-3110 Planting Plan - Ground Floor (Rev 3) • LDA-3200 Planting Plan - Level 1 (Rev 3) • LDA-3300 Planting Plan - Level 15 (Rev 3) • LDA-4000 Landscape Sections (Rev 3) • LDA-5000 Typ. Details 01 – Hardworks (Rev 3) • LDA-5010 Typ. Details 02 - Softworks (Rev 3) • LDA-6000 Material Palette (Rev 3) 	23 September 2024
16.	Elephants Foot Responses to Contentions	-
17.	Traffic Assessment Report prepared by JMT Consulting	24 September 2024
18.	Arboricultural Impact Assessment, prepared by Blue Gum Arborist	May 2024

TAB	DOCUMENT	DATE
19.	Correspondence from Transport for NSW to City of Ryde Council	29 January 2024

10 The Court orders that:

- (1) The appeal is upheld.
- (2) The Applicant's written request pursuant to clause 4.6 of the Ryde Local Environmental Plan 2014 seeking a contravention of the height of building development standard set out in clause 4.3 is upheld.
- (3) The Applicant's written request under clause 4.6 of the Ryde Local Environmental Plan 2014 seeking a contravention of the non-discretionary car parking development standard set out in clause 68(2)(e) of State Environmental Planning Policy (Housing) 2021 is upheld.
- (4) Development consent is granted to development application LDA2023/0320, as amended, for demolition of existing buildings and construction of a 19-storey co-living and student accommodation development, comprising 507 rooms with 2 basement levels and associated landscaping and works at 169-171 Herring Road, Macquarie Park, subject to the conditions in the annexure marked A.
- (5) The Applicant is to pay the Respondent's costs thrown away by the amendment of the Development Application, pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, as assessed or agreed within 28 days of the date of these orders.

H Miller

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.

Decision last updated: 22 January 2025