



Land and Environment Court New South Wales

Medium Neutral Citation:

**Sasco Developments Pty Limited v City of Ryde
Council [2022] NSWLEC 1389**

Hearing dates:

Conciliation conference 18 July 2022

Date of orders:

18 July 2022

Decision date:

18 July 2022

Jurisdiction:

Class 1

Before:

Gray C

Decision:

The Court orders that:

- (1) The Applicant's written request under clause 4.6 of the Ryde Local Environmental Plan 2014 (LEP), seeking variation of the development standard for height under clause 4.3 of the LEP is upheld.
- (2) The appeal is upheld.
- (3) Development Consent is granted to LDA2020/0199 for the demolition of existing structures and construction of a mixed use development comprising four x 6 to 7 storey buildings containing 133 apartments, 162 boarding rooms and commercial floor space with basement parking at 1-20 Railway Road and 50 Constitution Road, Meadowbank, subject to conditions contained in Annexure 'A'.

Catchwords:

APPEAL – mixed use development – boarding house – residential apartments – commercial uses – conciliation conference – agreement reached – orders made

Legislation Cited:

Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 4.17, 7.4, 7.5, 7.7, 8.7
Environmental Planning and Assessment Regulation 2000, cl 25D, 50, 55, Sch 1
Land and Environment Court Act 1979, s 34
Ryde Local Environmental Plan 2014 cl 4.3, 4.4, 4.6, 5.10, 6.1, 6.2, 6.4, 6.6
State Environmental Planning Policy (Affordable Rental Housing) 2009, cl 29, 30, 30A
State Environmental Planning Policy (Housing) 2021

	State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development, cl 30
	State Environmental Planning Policy (Resilience and Hazards) 2021, cl 4.6
	State Environmental Planning Policy (Transport and Infrastructure) 2021, cl 2.99, 2.100, 2.122
Cases Cited:	Fusion Development Pty Ltd v Randwick City Council [2022] NSWLEC 1255
	Omayya Investments Pty Limited v Dean Street Holdings Pty Limited (No 5) [2020] NSWLEC 9
	Sanctuary Investments Pty Ltd v Baulkham Hills Shire Council (2006) 153 LGERA 355; [2006] NSWLEC 733
Texts Cited:	NSW Department of Planning and Environment, Apartment Design Guide (July 2015)
Category:	Principal judgment
Parties:	Sasco Developments Pty Limited (Applicant) City of Ryde Council (Respondent)
Representation:	Counsel: M Staunton (Applicant) P Kapetas (Solicitor) (Respondent)
	Solicitors: Mills Oakley (Applicant) City of Ryde Council (Respondent)
File Number(s):	2021/216311
Publication restriction:	No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal concerning a development application for the demolition of existing structures and the construction of a mixed-use development comprising four buildings of 6 or 7 storeys containing 133 residential apartments, 162 boarding rooms, ground floor commercial floor space and basement car parking at 1-20 Railway Road and 50 Constitution Road, Meadowbank. Following the expiry of the period after which a development application is deemed to be refused, the applicant lodged an appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act). Subsequent to the commencement of the appeal, the development application was refused by the Sydney North Planning Panel. In exercising the functions of the consent authority on the 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 [17] below, are made as a result of an agreement between the parties that was reached at a conciliation conference.

- 2 The hearing of the appeal commenced onsite today, on 18 July 2022. Following the adjournment of the hearing, 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 also held today. I presided over the conciliation conference.
- 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 filed on 18 July 2022, following the lodging of an amended development application on the NSW Planning Portal with the agreement of the Council, as required by cl 55(1) of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation 2000). The amendments to the development application include amended civil plans reflecting the public works to be carried out, and a BASIX compliance letter. The amended development application also incorporates an offer to enter into a Voluntary Planning Agreement (VPA) for:
- (a) The dedication of land to widen Faraday Lane and allow for two-way full carriageway access, the dedication of land to widen the road reserve and carriageway on Underdale Lane, and the dedication of an area in stratum title for the public footpath on Faraday Lane.
 - (b) The carrying out of works within the road reserve and on the areas of land proposed to be dedicated.
 - (c) The carrying out of works to create a connection from Faraday Lane to Constitution Avenue and associated civil works.
- 4 The decision agreed upon is for the grant of a deferred commencement consent subject to conditions of consent pursuant to s 4.16(1) of the EPA Act. The signed agreement is supported by a Jurisdictional Note that sets out the nature of the development application, the amendments made in the course of the appeal proceedings, and the jurisdictional matters about which the consent authority must be satisfied prior to the grant of development consent. I have considered the Jurisdictional Note, together with the documents referred to therein.
- 5 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 can make 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 reasons set out below.
- 6 Firstly, the development is for the purpose of a boarding house, commercial premises, and shop top housing, which are permissible in the B4 Mixed Use zone in which the site is located, pursuant to the Ryde Local Environmental Plan 2014 (RLEP).

Secondly, the provisions of the State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH) apply to the development. The State Environmental Planning Policy (Housing) 2021 (SEPP (Housing)) commenced on 26 November 2021. Schedule 7 includes a savings provision, the effect of which is that the provisions of the SEPP ARH continue to apply to the development application. At cl 30 of the SEPP ARH, consent cannot be granted unless certain requirements are met. Based on the Jurisdictional Note and the architectural plans, I am satisfied that each of the matters in cl 30(1) of the SEPP ARH are met by the proposed development. Clause 30A of the SEPP ARH requires consideration of “whether the design of the development is compatible with the character of the local area”. I am satisfied that the stepped form of the development between 6 and 7 storeys and its design is compatible with the surrounding developments and the high-density character of the local area.

8 I note also that cl 29 of the SEPP ARH sets out a number of grounds on which consent cannot be refused if certain criteria are met. The proposed development meets the criteria for density and scale, private open space, parking and accommodation size.

9 Thirdly, with respect to the development standards that apply to the proposed development:

- Clause 4.4 of the RLEP imposes a floor space ratio (FSR) development standard of 2.7:1. The proposed development does not comply with this development standard, but the operation of cl 29(1)(c)(ii) of the SEPP ARH precludes a consent authority from refusing consent on the grounds of density or scale if the FSR is not greater than the standard plus an additional 20%. As such, the total FSR permitted on the site for the proposed development is 3.24:1, with which the development complies. I consider that cl 29(1)(c)(ii) applies to the whole of the development site notwithstanding that it is a mixed-use development containing a boarding house, which is consistent with the approach regularly taken by the Court (see, for example, *Fusion Development Pty Ltd v Randwick City Council* [2022] NSWLEC 1255). As a result, the precautionary request prepared by the applicant pursuant to cl 4.6 of the RLEP concerning the FSR development standard is not required.
- I am satisfied that consent should be granted notwithstanding the contravention of the height development standard. The development standard establishes a maximum height of 18.5m on part of the site and 21.5m on that part of the site at the corner of Railway Road and Constitution Road, pursuant to cl 4.3 of the RLEP. The proposed maximum height of the development varies from 24.56m for building C, to 25.87m for building D. This represents a contravention of up to 7.3m above the height development standard. I am satisfied that the written request, lodged pursuant to cl 4.6 of the RLEP and annexed to the Statement of Environmental Effects lodged with the Class 1 Application, adequately establishes sufficient environmental planning grounds that justify the breach in the height development standard. It does so by demonstrating that the breach

allows for building mass to be centred above the buildings to enable significant setbacks at the intersection of Railway Road and Constitution Road to provide a plaza area and for the built form of the development to be broken up as four distinct residential towers. The approximate volume of the plaza area and the setbacks is equivalent to one storey across buildings A and B. I am also satisfied that the written request demonstrates that compliance with the standard is unreasonable and unnecessary given that the proposal is consistent with the objectives of the standard notwithstanding the non-compliance, and as there is no impact caused by the breach of the standard. Further, I am satisfied, based on the content of the written request, that the proposal is in the public interest because it is consistent with the objectives of the zone and of the standard.

10 Fourthly, in relation to the other relevant provisions of the RLEP:

- The development is located in the vicinity of two local heritage items and the effect of the development on the heritage significance of the heritage items has been considered, as required by cl 5.10(4) of the RLEP. A Statement of Heritage Impact dated 25 May 2020 accompanied the Class 1 Application and I am satisfied that the proposed development does not unacceptably impact the heritage significance of the heritage items.
- Pursuant to cl 6.1 of the RLEP, the subject site is mapped as being Class 5 acid sulphate soils and is within 500m of land mapped as Class 2. An Acid Sulphate Assessment dated 13 October 2020 concludes that the elevation of the site and the proposed excavation depth means that there is no excavation below RL 1m AHD and an acid sulphate soils management plan is not required.
- The development application includes earthworks for the provision of the basement level for car parking. Based on the amended geotechnical report dated October 2020, I have considered the matters set out in cl 6.2(3) of the RLEP.
- Based on the stormwater plans, the BASIX report, the Waste Management Plan and the Statement of Environmental Effects, I am satisfied that the development will comply with the relevant stormwater management and environmental sustainability requirements under cll 6.4 and 6.6 of the RLEP.

11 Fifthly, in relation to the remaining state environmental planning policies that apply to the site:

- Consideration has been given as to whether the subject site is contaminated as required by cl 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021, and, consistent with the requirements of cl 4.6(2), I have considered a report specifying the findings of a preliminary investigation of the land concerned and a Detailed Site Assessment prepared by Benviron Group

dated February 2020. The report confirms that the site is able to be remediated in accordance with a Remedial Action Plan dated February 2020 and, therefore, will be made suitable for the proposed development.

- As required by cl 30(2) of State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development and based on the Urban Design Report dated 27 May 2020 and the Design Verification Statement dated 11 May 2020, I am satisfied that adequate regard has been given to the design quality principles and to the objectives specified in the Apartment Design Guide for the relevant design criteria.
- The proposed development is adjacent to a rail corridor, and cl 2.99 and 2.100 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP TI) therefore apply. A Structural Engineering Report and Construction Methodology dated 11 March 2020 confirms that the proposed excavation will be located at least 33m from the rail corridor, such that the provisions of cl 2.99 do not apply. Further, consistent with cl 2.100 and based on the acoustic report dated 7 May 2020, I have taken into consideration the matters in cl 2.100(2) and I am satisfied that appropriate measures will be taken to ensure that the LAeq levels in cl 2.100(3) are not exceeded.
- Clause 2.122 of the SEPP TI also applies, as the proposed development is traffic generating development. Transport for NSW has been notified of the development application and provided its comments. In response to those comments, a Traffic and Parking Impact Assessment was prepared dated 23 November 2021. A traffic review dated 1 December 2021 was also prepared. Based on these documents, I have taken into consideration the matters in cl 2.122(4) of the SEPP TI.

12 In addition, the following prerequisites to the grant of development consent are satisfied:

- The amended development application is accompanied by a BASIX Certificate in accordance with the requirements of Sch 1 of the EPA Regulation 2000.
- The amended development application is accompanied by a statement of a qualified designer dated 11 May 2020 that verifies the design of the development, as required by cl 50(1A) and (1AB) of the EPA Regulation 2000.

13 Further, the VPA provides a lawful manner in which interests in land can be dedicated to Council (see *Sanctuary Investments Pty Ltd v Baulkham Hills Shire Council* (2006) 153 LGERA 355; [2006] NSWLEC 733 at [42]-[46]) and I am satisfied that the proposed VPA meets the requirements of s 7.4 of the EPA Act, including that it provides for the dedication of land and the carrying out of works, and the provision of a material public benefit, to be used for a public purpose. In exercising the functions of the consent authority, the Court has the power to impose the conditions of consent, pursuant to ss 4.16(1) and 4.17 of the EPA Act. Pursuant to s 7.7(3), this power extends to the

imposition of the condition of consent that requires the developer to enter into the VPA in the terms of the offer made by the developer. The requirement, pursuant to s 7.5 of the EPA Act and cl 25D of the EPA Regulation 2000, to notify the proposed VPA can be met following the grant of consent and prior to entry into the VPA (see *Omayia Investments Pty Limited v Dean Street Holdings Pty Limited (No 5)* [2020] NSWLEC 9 at [270]-[272]).

- 14 For the above reasons, I have reached the state of satisfaction that the decision is one that the Court could make in the exercise of its functions. Accordingly, 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)).
- 15 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, 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.
- 16 The Court notes that:
- (1) City of Ryde Council, as the relevant consent authority, has agreed under clause 55(1) of the Environmental Planning and Assessment Regulation 2000, to the Applicant amending Development Application LDA2020/0199 in accordance with the documents listed below:

Plan name	Drawing Number	Revision	Date	Prepared by
Amended Civil Plans				
Cover	-	H	04/05/2022	Alpha Engineering & Development
General Arrangement Plan	CIV01	H	04/05/2022	Alpha Engineering & Development
Service and Utility Plan (Sheet 1 Of 2)	CIV02	H	04/05/2022	Alpha Engineering & Development

Plan name	Drawing Number	Revision	Date	Prepared by
Service and Utility Plan (Sheet 2 Of 2)	CIV03	H	04/05/2022	Alpha Engineering & Development
Public Domain Plan (Sheet 1 Of 2)	CIV04	H	04/05/2022	Alpha Engineering & Development
Public Domain Plan (Sheet 2 Of 2)	CIV05	H	04/05/2022	Alpha Engineering & Development
Swept Path Analysis	CIV06	H	04/05/2022	Alpha Engineering & Development
Public Domain Alignment Chainage and Spot Elevation	CIV07	H	04/05/2022	Alpha Engineering & Development
Cut and Fill Details	CIV08	H	04/05/2022	Alpha Engineering & Development
Underdale and Faraday Lane Road - Centreline Long Section	CIV09	H	04/05/2022	Alpha Engineering & Development
Faraday Lane Lip of Gutter (Left) - Longitudinal Section	CIV10	H	04/05/2022	Alpha Engineering & Development

Plan name	Drawing Number	Revision	Date	Prepared by
Underdale and Faraday Lane – Boundary Long Section	CIV11	H	04/05/2022	Alpha Engineering & Development
Cross Sections (Sheet 1 of 5)	CIV12	H	04/05/2022	Alpha Engineering & Development
Cross Sections (Sheet 2 of 5)	CIV13	H	04/05/2022	Alpha Engineering & Development
Cross Sections (Sheet 3 of 5)	CIV14	H	04/05/2022	Alpha Engineering & Development
Cross Sections (Sheet 4 of 5)	CIV15	H	04/05/2022	Alpha Engineering & Development
Cross Sections (Sheet 5 of 5)	CIV16	H	04/05/2022	Alpha Engineering & Development
Council Standard Drawings – Kerb Ramp and Pavement Type Granite	CIV17	H	04/05/2022	Alpha Engineering & Development
Council Standard Drawings - Tree Pit Detail and Typical Pavement Structure Local Road	CIV18	H	04/05/2022	Alpha Engineering & Development

Plan name	Drawing Number	Revision	Date	Prepared by
Council Standard Drawings - Heavy Duty Layback And Driveway	CIV19	H	04/05/2022	Alpha Engineering & Development
Council Standard Drawings – Raised Pedestrian Crossings Typical Section	CIV20	H	04/05/2022	Alpha Engineering & Development
Typical Drawing for Service Conduit Under Footpath	CIV21	H	04/05/2022	Alpha Engineering & Development
Supporting Documentation				
Document				Date
Voluntary Planning Agreement				July 2022
BASIX Compliance Letter prepared by GEC Design				15 June 2022

(2) The amended development application documents listed above were lodged on the NSW planning portal on 15 July 2022.

(3) The amended development application was filed with the Court on 15 July 2022.

17 The Court orders that:

- (1) The Applicant's written request under clause 4.6 of the Ryde Local Environmental Plan 2014 (LEP), seeking variation of the development standard for height under clause 4.3 of the LEP is upheld.
- (2) The appeal is upheld.
- (3) Development Consent is granted to LDA2020/0199 for the demolition of existing structures and construction of a mixed use development comprising four x 6 to 7 storey buildings containing 133 apartments, 162 boarding rooms and commercial floor space with basement parking at 1-20 Railway Road and 50 Constitution Road, Meadowbank, subject to conditions contained in Annexure 'A'.

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Joanne Gray

Commissioner of the Court

Annexure A (782843,.pdf)

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Decision last updated: 19 July 2022