



Land and Environment Court  
New South Wales

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Case Name: Kogarah Investments No. 3 Pty Ltd v Georges River Council

Medium Neutral Citation: [2025] NSWLEC 1353

Hearing Date(s): Conciliation conference held 22 November, 13 December 2024, 10 February, 10 March, 4 April, 8 April 2025

Date of Orders: 21 May 2025

Decision Date: 21 May 2025

Jurisdiction: Class 1

Before: Pullinger AC

Decision: The Court orders that:  
(1) Leave is granted to the Applicant to amend Development Application DA2023/0222 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 as agreed or assessed.  
(3) The Applicant's written request, pursuant to cl 4.6 of the Georges River Local Environmental Plan 2021 (GRLEP), seeking to vary the development standard for height of buildings as set out at cl 4.3 of the GRLEP, is upheld.  
(4) The Applicant's written request, pursuant to cl 4.6 of the GRLEP, seeking to vary the development standard for car parking as set out at s 148 of State Environmental Planning Policy (Housing), is upheld.  
(5) The appeal is upheld.  
(6) Consent is granted to Development Application

DA2023/0222 (as amended) for the demolition of existing structures, removal of sixteen trees and the construction of a ten-storey mixed use development comprising a residential apartment building containing 95 apartments and three commercial tenancies, four levels of basement parking, landscaping and site works at 1 Stanley Street, Kogarah, subject to the conditions of consent at Annexure A.

Catchwords:	DEVELOPMENT APPLICATION – mixed use residential apartment building development – cl 4.6 written request – height of buildings – agreement between the parties – orders
Legislation Cited:	Design and Building Practitioners Act 2020 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 27, 29, 37, 38 Georges River Local Environmental Plan 2021, cll 2.3, 2.7, 4.3, 4.6, 6.2, 6.3, 6.9, 6.10, 6.11, 6.12 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy (Housing) 2021 Ch 4, Sch 9, ss 147, 148 State Environmental Planning Policy (Resilience and Hazards) 2021, Ch 4, s 4.6 State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.119, 2.120
Texts Cited:	NSW Department of Planning, Apartment Design Guide (July 2015) NSW Department of Planning and Environment, Planning Circular PS 20-002, May 2020 Transport for NSW, Guide to Transport Impact Assessment, November 2024
Category:	Principal judgment
Parties:	Kogarah Investments No. 3 Pty Ltd (Applicant) Georges River Council (Respondent)
Representation:	Counsel: D Loether (Solicitor) (Applicant)

A Foley (Solicitor) (Respondent)

Solicitors:

Bartier Perry Lawyers (Applicant)

Marsdens Law Group (Respondent)

File Number(s): 2024/229146

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 Kogarah Investment No. 3 Pty Ltd (the Applicant), against the refusal of Development Application DA2023/0222 (the DA) by Georges River Council (the Respondent) under the direction of the Sydney South Planning Panel.
- 2 At the date of its lodgement on 13 July 2023, the DA sought consent for the demolition of existing structures, removal of sixteen trees and the construction of a ten-storey shop-top housing development containing 102 apartments, three commercial tenancies and two levels of basement parking landscaping and site works at 1 Stanley Street, Kogarah (the site).
- 3 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 22 November and 13 December 2024, and 10 February, 10 March, 4 April, and 8 April 2025. I presided over the conciliation conference.
- 4 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.
- 5 Of particular note, the proposal has been amended by agreement between the parties to resolve the contentions raised by the Respondent. These contentions included issues of excessive building height, potential inconsistency with the floor space ratio (FSR) control, excessive bulk, scale and massing, inadequacies in the provision of an anticipated through site link, inadequate residential amenity, inadequate provision of solar access, inadequate natural

cross ventilation, inadequate amenity to commercial tenancies, unsatisfactory landscape design outcomes, inadequate environmental sustainability, potential site isolation, insufficient provision of car parking, and a failure to exhibit design excellence, amongst other contentions.

- 6 Agreed design amendments have now been made to improve the proposed buildings' relationship to the site and its context. Changes have been made to reduce the overall bulk and scale of the proposal. The FSR has been demonstrated to be consistent with the relevant control. A minor height exceedance is now agreed to be appropriately justified. Other issues such as parking rates, residential amenity, site isolation, the configuration of the proposed through site link, and architectural expression have been satisfactorily resolved.
- 7 The effect of these amendments is also to reduce the total number of apartments from 102 to 95 and to increase the car parking provision from 53 spaces to 85 spaces.
- 8 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.
- 9 There are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 10 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.
- 11 The DA was publicly notified in accordance with the Respondent's Community Participation Plan from 3 August to 17 August 2023. A total of twenty submissions were received by the Respondent in response to this notification.
- 12 On 10 March 2024, following correspondence between the parties, the Applicant amended the DA to address the Respondent's feedback.
- 13 The amended DA was re-notified from 28 March to 18 April 2024. The Respondent received seven additional submissions.

- 14 The public submissions in response to both notifications raised concerns including:
- (1) Pedestrian safety due to the siting of the proposed driveway.
  - (2) Impacts upon local ecology.
  - (3) Overshadowing impacts upon neighbouring properties.
  - (4) Impacts arising from the proposed increased density on the site.
  - (5) Limited utilities and infrastructure, and insufficient green space in the locality, to adequately service new residents.
  - (6) In appropriate building character negatively impacting the aesthetics of Stanley Street.
  - (7) Inadequate setbacks to adjoining properties.
  - (8) The inadequate width and safety of Stanley Street to accommodate increased traffic.
  - (9) Flooding impacts upon neighbouring basements.
  - (10) Negative impacts on local property values.
  - (11) Insufficient car parking provision.
  - (12) Impacts of excavation on structural integrity of adjoining properties.
  - (13) View loss.
  - (14) Cross viewing and visual privacy impacts.
  - (15) Site isolation.
  - (16) Excessive building height.
  - (17) Construction phase impacts including traffic during demolition, noise, vibration and dust pollution.
  - (18) The overdevelopment of the site.
- 15 At the site view on the morning of 22 November 2024, two affected local residents addressed the Court to restate their concerns, and the Court visited adjacent properties to directly observe building separation, privacy and overshadowing relationships.
- 16 The parties agree, and I am satisfied, the final amended DA now satisfactorily addresses concerns raised in public submissions, primarily by reducing the proposed building form, bulk and scale, by ensuring improved privacy between neighbouring properties, and by increasing the provision of on-site car parking. 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 Georges River Local Environmental Plan 2021 (GRLEP) is the relevant local environmental planning instrument. The site is zoned R4 High Density Residential. The final amended DA - characterised as mixed use residential apartment development - is permissible with consent within the R4 zone.
- 18 The parties agree, and I am satisfied, that pursuant to cl 2.3 of the GRLEP, the final amended DA is consistent with the R4 Medium Density Residential zone objectives.
- 19 The parties agree, and I am satisfied, that pursuant to cl 2.7 of the GRLEP, demolition of existing structures is permissible with consent. The final amended DA proposes demolition of the existing structures occupying the site.
- 20 The parties agree, and I am satisfied, that all principal development standards of the GRLEP 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 of the GRLEP (at the date the DA was lodged) requires consideration of a written request from the Applicant demonstrating that compliance with the height of building 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 of the GRLEP (at the date the DA was lodged) then requires the consent authority (the Court in this instance) to be satisfied that the Applicant's written request adequately addresses the matters set out at cl 4.6, and that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard (for height of buildings) and the objectives for development within the zone (R4 High density residential) in which the development is proposed to be carried out.
- 23 Additionally, cl 4.6 of the GRLEP requires the concurrence of the Planning Secretary be obtained, and requires the Planning Secretary to consider whether the proposed contravention of the development standard raises

matters of significance for State environmental planning, and the public benefits of maintaining the standard.

- 24 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.
- 25 The Applicant has provided a written request seeking to vary the height of buildings development standard, prepared by Sutherland and Associates Planning, dated February 2025.
- 26 Pursuant to cl 4.3 of the GRLEP the site is subject to a height of building development standard of 33m.
- 27 The amended DA proposes a maximum building height of 35.23m, exceeding the relevant height of building development standard by 2,230mm and representing a variance of approximately 6.8%.
- 28 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 final amended DA is agreed to be an appropriate form and scale that is compatible with the existing streetscape and desired future character of the immediate locality.
  - (2) The area of building height exceedance relates to a relatively minor portion of the proposed building, limited to rooftop parapets, lift overruns centrally situated within the site and associated shade structures, which provide amenity to proposed rooftop communal open space.
  - (3) The proposed building height exceedance results generally from the provision of ten residential storeys (as anticipated by the development control suite) within the GRLEP height control. Recent changes to the National Construction Code and the introduction of the *Design and Building Practitioners Act 2020* have the effect of requiring slightly greater floor to floor heights (3,125mm and 3,150mm in this instance) in order to achieve appropriate waterproofing set-downs and roof insulation whilst still resulting in the necessary 2.7m ceiling heights within residential apartments.
  - (4) The proposed variation is numerically minor and will not be readily distinguishable from neighbouring properties or the street when compared with a compliant scheme or other comparable recent development in the area.

- (5) The amended DA is consistent with anticipated building setbacks, and results in reduced site coverage, increased landscape areas and the retention of significant trees.
  - (6) The proposed height exceedance does not give rise to unreasonable adverse visual impacts, overshadowing, disruption to views or loss of privacy to neighbouring properties.
  - (7) The proposed height exceedance is partly attributable to lift over-runs and shade structures, which serve rooftop communal open space of good amenity.
  - (8) The relevant objectives of the GRLEP Zone R4 High Density Residential land use zone include to provide for the housing needs of the community within a high density residential environment; to provide a variety of housing types within a high density residential environment; to enable other land uses that provide facilities or services to meet the day to day needs of residents; to enable other land uses that contribute to the vibrancy of the neighbourhood while ensuring that business centres remain the focus for business and retail activity; and to encourage development that maximises public transport patronage and promotes walking and cycling. I am satisfied the amended DA is consistent with these objectives.
  - (9) The relevant objectives of cl 4.3 of the GRLEP include to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality; to minimise the impact of overshadowing, visual impact, disruption of views and loss of privacy on adjoining properties and open space areas; and to ensure an appropriate height transition between new buildings and adjoining land uses and heritage items, heritage conservation areas or Aboriginal places of heritage significance. I am satisfied the amended DA meets these objectives.
- 29 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.
- 30 The parties agree, and I am satisfied, that the amended DA proposes excavation works forming a matter for consideration pursuant to cl 6.2 of the GRLEP (Earthworks). I am satisfied the matters set out at cl 6.2(3) have been given appropriate consideration. Agreed conditions of consent are imposed to regulate excavation and construction phase works.
- 31 The parties agree, and I am satisfied, that pursuant to cl 6.3 of the GRLEP (Stormwater management), the final amended DA satisfactorily addresses those matters set out at cl 6.3(2) and that the proposal is designed to maximise water-permeable surfaces on the site, including on-site stormwater detention,



and avoids significant adverse impacts of stormwater runoff on adjoining properties.

- 32 The parties agree, and I am satisfied, that pursuant to cl 6.9 of the GRLEP (Essential services), the site is appropriately serviced for the anticipated development.
- 33 The parties agree, and I am satisfied, that pursuant to cl 6.10 of the GRLEP (Design excellence), the final amended DA satisfactorily addresses those matters set out at cl 6.10(5) and accordingly is agreed to exhibit design excellence.
- 34 The parties agree, and I am satisfied, that pursuant to cl 6.11 of the GRLEP (Environmental sustainability), the final amended DA satisfactorily addresses those matters set out at cl 6.11(3) and accordingly is agreed to achieve an acceptable level of environmental sustainability appropriate to its scale and location.
- 35 The parties agree, and I am satisfied, that pursuant to cl 6.12 of the GRLEP (Landscaped areas in certain residential and conservation zones), the final amended DA satisfactorily addresses the relevant matters set out at cl 6.12(4) and accordingly is agreed to meet the landscape objectives of the clause.
- 36 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.
- 37 Chapter 4 of SEPP Resilience deals with remediation of land. Pursuant to s 4.6 of SEPP Resilience, the Applicant has provided a Detailed Site Investigation (DSI), prepared by EI Australia and dated 18 May 2023.
- 38 The DSI confirms that long-term pre-existing use of the site has been for residential purposes unlikely to be contaminated. Agreed conditions of consent are imposed to ensure the recommendations of the DSI are complied with.
- 39 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.

- 40 Pursuant to s 2.119 of SEPP Infrastructure, the site has a frontage to the Princes Highway, which is a classified road. The final amended DA does not provide vehicular access to the site from the Princes Highway frontage and instead is accessed by vehicles from Stanley Street.
- 41 Pursuant to s 2.120 of SEPP Infrastructure, the site's proposed residential use and proximity to the Princes Highway, with an average daily traffic volume of more than 20,000 vehicles, triggers certain requirements to mitigate against road noise and vibration. Accordingly, the Applicant has provided an Acoustic Assessment prepared by Acouras Consultancy dated 13 November 2023 addressing the requirements of s 2.120 and setting out recommendations to ensure appropriate mitigation against acoustic impacts within the proposed residential apartments. Agreed conditions of consent are imposed to ensure implementation of the recommendations in the Acoustic Assessment.
- 42 The parties agree, and I am satisfied, that the final amended DA remains subject to the provisions of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX).
- 43 Consistent with SEPP BASIX and pursuant to s 27 of the Environmental Planning and Assessment Regulation 2021 (EPA Reg), a BASIX certificate, 1367763M\_02, dated 14 March 2025, has been provided with the final amended DA. Agreed conditions of consent are imposed to ensure compliance with the BASIX certificate.
- 44 The parties agree, and I am satisfied, that the amended DA is subject to the provisions of Ch 4 of State Environmental Planning Policy (Housing) 2021 (SEPP Housing).
- 45 Pursuant to the relevant provisions of SEPP Housing and the EPA Reg, the Applicant's architect, Tony Owen and Partners (and its nominated architect Mr Tony Owen - NSW registered architect 7080) has prepared a Design Verification Statement dated December 2024, fulfilling the requirements of s 29 of the EPA Reg and confirming that the final amended DA achieves the Design principles set out in Sch 9 of SEPP Housing. This statement also sets out how the objectives of Parts 3 and 4 of the Apartment Design Guide have been

achieved in the design of the final amended DA. Accordingly, I am satisfied the amended DA meets the requirements of s 147 of SEPP Housing.

- 46 Pursuant to s 148 of SEPP Housing, the Apartment Design Guide nominates a non-discretionary development standard for car parking rates dependent on the site's location relative to particular public transport and urban centres. The final amended DA departs, by agreement, from the Metropolitan Sub-Regional Centre car parking rates and provides fewer spaces than the rate specifies.
- 47 As a development standard amenable to cl 4.6 of the GRLEP, the Applicant has provided a written request seeking to vary the car parking development standard, prepared by Sutherland and Associates Planning, dated March 2025.
- 48 Adopting the relevant parking rates established by s 148 of the Housing SEPP, the final amended DA would require 103 car spaces.
- 49 The amended DA proposes a total of 79 residential and visitor car spaces, falling short of the relevant development standard by 24 spaces and representing a variance of approximately 23%.
- 50 The parties agree, and I am satisfied, that the written request adequately justifies the proposed variance to the car parking development standard for the following reasons:
- (1) Fewer car parking spaces than otherwise required is appropriate due to the site's highly accessible location within a ten minute walk of Kogarah town centre with access to Kogarah railway station.
  - (2) If the DA were to have been lodged after 4 November 2024 the proposed car parking provision would be compliant with new car parking rates in the recently adopted NSW Guide to Transport Impact Assessment (GTIA). The GTIA provides an updated methodology for determining appropriate car parking rates and assesses site accessibility by specific address rather than by broader precincts or zones.
- 51 Consequently, I am satisfied the Applicant's cl 4.6 written request adequately justifies the proposed variation to the car parking development standard, and I find to uphold the written request.
- 52 The parties agree, and I am satisfied, that those remaining relevant matters set out at s 4.15 of the EPA Act have been taken into consideration, and that the amended DA warrants the grant of consent, subject to conditions.

53 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.

54 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 final amended DA with the Court on 11 April 2025.

### **Orders**

55 The Court orders that:

- (1) Leave is granted to the Applicant to amend Development Application DA2023/0222 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 as agreed or assessed.
- (3) The Applicant's written request, pursuant to cl 4.6 of the Georges River Local Environmental Plan 2021 (GRLEP), seeking to vary the development standard for height of buildings as set out at cl 4.3 of the GRLEP, is upheld.
- (4) The Applicant's written request, pursuant to cl 4.6 of the GRLEP, seeking to vary the development standard for car parking as set out at s 148 of State Environmental Planning Policy (Housing), is upheld.
- (5) The appeal is upheld.
- (6) Consent is granted to Development Application DA2023/0222 (as amended) for the demolition of existing structures, removal of sixteen trees and the construction of a ten-storey mixed use development comprising a residential apartment building containing 95 apartments and three commercial tenancies, four levels of basement parking, landscaping and site works at 1 Stanley Street, Kogarah, subject to the conditions of consent at Annexure A.

**M Pullinger**

**Acting Commissioner of the Court**

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[Annexure A \(660 KB, pdf\)](#)

[Architectural Plans - Part 1 \(30.9 MB, pdf\)](#)

[Architectural Plans - Part 2 \(31.1 MB, pdf\)](#)

[Architectural Plans - Part 3 \(24.6 MB, pdf\)](#)

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