



## Land and Environment Court New South Wales

**Medium Neutral Citation:**

**Trustees of the Roman Catholic Church for the  
Diocese of Wollongong v Wollongong City Council  
[2025] NSWLEC 1871**

**Hearing dates:**

Conciliation conference 19-20 November 2025

**Date of orders:**

10 December 2025

**Decision date:**

10 December 2025

**Jurisdiction:**

Class 1

**Before:**

Horton C

**Decision:**

The Court orders that:

(1) The Applicant's written request, pursuant to clause 4.6 of the Wollongong Local Environmental Plan 2009 (LEP) to vary the development standard for floor space ratio contained in clause 4.4 of the LEP as prepared by MMJ Planning dated 18 August 2025 is upheld.

(2) In accordance with section 8.15(3) of the *Environmental Planning & Assessment Act 1979* (NSW), the Applicant is to pay the Respondent's costs thrown away as a result of the amendments in Annexure A, and on 25 August 2025, in the sum of \$33,000, to be paid within 60 days from these orders.

(3) The appeal is upheld.

(4) Development Application DA-2024/26 for demolition of existing structures, and construction of a 16-storey mixed-use building comprising 5 levels of commercial premises, 61 shop top housing residential apartments (including 12 affordable dwellings), communal spaces and 4 levels of basement car parking with associated earthworks, landscaping, service infrastructure and stormwater drainage works at 23-27 Auburn Street and 38 Ellen Street Wollongong, is determined by the grant of consent subject to conditions contained in Annexure B.

**Catchwords:**

DEVELOPMENT APPLICATION: residential apartment development – residential flat building – mixed use development in E2 and E3 zone – conciliation conference – agreement between parties - orders

**Legislation Cited:**

*Environmental Planning and Assessment Act 1979 (NSW)*, ss 4.16, 8.7

*Land and Environment Court Act 1979 (NSW)*, s 34

Environmental Planning and Assessment Regulation 2021 (NSW), ss 29, 38

State Environment Planning Policy (Housing) 2021, ss 147, 148, Sch 9

State Environmental Planning Policy (Planning Systems) 2021, s 2.19

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

State Environmental Planning Policy (Sustainable Buildings) 2022, s 2.1

State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.48, 2.100

Wollongong Local Environmental Plan 2009, cll 2.2, 4.3, 4.4, 4.4A, 4.6, 5.10, 5.21, 5.22, 7.5, 7.6, 7.14, 7.18, Sch 1

**Cases Cited:**

*Toga Penrith Developments Pty Limited v Penrith City Council* [2022] NSWLEC 117

*Wollongong Invest Land No.3 Pty Ltd v Wollongong City Council* [2022] NSWLEC 1425

**Texts Cited:**

Apartment Design Guide 2015

**Category:**

Principal judgment

**Parties:**

Trustees of the Roman Catholic Church for the Diocese of Wollongong (Applicant)

Wollongong City Council (Respondent)

**Representation:**

Counsel:

A Galasso SC (Applicant)

M Staunton (Respondent)

Solicitors:

Mills Oakley (Applicant)

Wollongong City Council (Respondent)

**File Number(s):**

2024/309249

**Publication restriction:**

Nil

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## JUDGMENT

- 1     **COMMISSIONER:** Mixed use development is proposed on a corner site at the intersection of Auburn and Ellen Streets in Wollongong, comprising 61 residential units above 5 levels of commercial tenancy over four levels of basement.
- 2     To this end, development application DA-2024/26 (the DA) seeking consent for the development on the site was lodged by the applicant in these proceedings, the Trustees of the Roman Catholic Church for the Diocese of Wollongong (the Church) with Wollongong City Council (the Council) on 12 January 2024.
- 3     As the estimated cost of the development is greater than \$30M, the development was declared to be regionally significant development pursuant to s 2.19(1) of State Environmental Planning Policy (Planning Systems) 2021. Accordingly, the DA was considered by the Southern Region Planning Panel on behalf of the Council.
- 4     As the DA was otherwise undetermined, the Church appealed its deemed refusal on 21 August 2024 under s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW).
- 5     The matter was initially listed before me for hearing on 18-20 November 2025. However, on the eve of the hearing, parties advised the Court they had reached an in-principle agreement on the matters in contention. On the morning of hearing, parties submitted an agreement in accordance with s 34(10) of the Land and Environment Court Act 1979 (NSW) (LEC Act), and on this basis, sought for the matter to be re-allocated for conciliation in accordance with s 34(1) of the LEC Act.
- 6     The matter was re-allocated to me on 18 November 2025 as presiding commissioner.
- 7     The parties ask me to uphold the appeal and grant conditional development consent to the development application according to terms set out in the s 34 agreement before the Court. In general terms, the agreement approves the development subject to amended plans that were prepared by the Church, and noting that the final detail of the works and plans are specified in the agreed conditions of development consent annexed to the s 34 agreement.
- 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 development application. There are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 9     For the reasons set out below, I am satisfied that the parties' decision is a decision that the Court could have made in the proper exercise of its functions.
- 10    Given the two frontages at the intersection, the site is known as 23-27 Auburn Street and 38 Ellen Street, and consists of six lots known as Lot 101 in DP 1232634, Lot 301 in DP 1015796, Lot 1 in DP 313504, Lot 2 in DP 313504, Lot 1 in DP 178853 and Lot

100 in DP 1232634. Written consent of the owners of the land has been given in respect of the DA.

- 11 The majority of the site is designated by the Wollongong Local Environmental Plan 2009 (WLEP) to be zoned E2 Commercial Centre, while a relatively narrow portion of the site fronting Ellen Street is zoned E3 Productivity Support.
- 12 Development for the purpose of Shop top housing and commercial premises are permitted with consent in the E2 zone, where consistent with the following objectives for development in the zone:
- 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 encourage development that is consistent with the centre's position in the centres hierarchy.
  - To strengthen the role of the Wollongong city centre as the business, retail and cultural centre of the Illawarra region.
- 13 While the Land Use Table at cl 2.2 of the WLEP does not identify shop top housing development as a permitted use in item 3, such a use is permitted by reference to the Additional Permitted Uses Map and Sch 1 of the WLEP which, at item 34, provides for shop top housing as a use that is permitted with consent in the E3 zone.
- 14 The objectives for development in the E3 zone are as follows:
- To provide a range of facilities and services, light industries, warehouses and offices.
  - To provide for land uses that are compatible with, but do not compete with, land uses in surrounding local and commercial centres.
  - To maintain the economic viability of local and commercial centres by limiting certain retail and commercial activity.
  - To provide for land uses that meet the needs of the community, businesses and industries but that are not suited to locations in other employment zones.
  - To provide opportunities for new and emerging light industries.
  - To enable other land uses that provide facilities and services to meet the day to day needs of workers, to sell goods of a large size, weight or quantity or to sell goods manufactured on-site.
  - To allow some diversity of activities that will not significantly detract from the operation of existing or proposed development or the amenity enjoyed by nearby residents, or have an adverse impact on the efficient operation of the surrounding road system.
- 15 The maximum height permitted on the site is derived by reference to cl 4.3 of the WLEP, and to provisions of the State Environment Planning Policy (Housing) 2021 (Housing SEPP) given the proposal includes 12 affordable housing units comprising

- 1,170.1m<sup>2</sup> of Gross Floor Area (GFA) to be managed by Housing Trust, a registered community housing provider in accordance with s 21(1)(b) of the Housing SEPP, according to the letter signed by Nikayla Beer-Herring dated 14 August 2025.
- 16 When the relevant provisions of the WLEP and the Housing SEPP are read together, the height standard applicable to that portion of the site located in the E2 zone is an additional 20% to that permitted by cl 4.3 of the WLEP of 60m, with which the proposal complies.
- 17 According to the relevant map at cl 4.3(2) of the WLEP, that portion of the proposed development located on the land zoned E3 has a maximum building height control of 9m. The parties agree that the development on this portion of the site exceeds the height control by 200mm at its highest point, but which is below the height standard of 10.8m that derives by virtue of the method set out at [16].
- 18 Together, the lots comprise an area of 2,622.2m<sup>2</sup> and form an 'L-shaped' site. The land located within the E2 zone is identified within the Wollongong City Centre precinct. The land zoned E3 is not within the Wollongong City Centre.
- 19 Clause 4.4A(2) of the WLEP tabulates the maximum floor space ratio (FSR) permitted for development proposed within the Wollongong City Centre. Where a mix of residential and non-residential uses is proposed, cl 4.4A(4) directs that a formula be used to calculate the overall residential vs non-residential GFA in the building as a whole. Drawing No. DA-300 of the architectural plans provides a breakdown of the formula relevant to the proposed development. When accounting for the 20% in-fill affordable housing bonus permitted by s 16 of the Housing SEPP, a total FSR of 5.45:1, or 10,991.0m<sup>2</sup> of GFA is permitted. The proposed quantum of GFA within the E2 parcel of land is 10,935.9m<sup>2</sup>, or 5.42:1, which complies.
- 20 A written request authored by MMJ Planning in accordance with cl 4.6 of the WLEP seeks to justify the contravention of the FSR standard on the E3 land.
- 21 The written request describes the exceedance of FSR to the effect that the part of the site located within the E3 zone is identified on the relevant map at cl 4.4(2) of the WLEP with a maximum permissible FSR control of 0.5:1, and 0.6:1 when the in-fill affordable housing bonus of 20% at s 16 of the Housing SEPP is factored. The proposed FSR of development on land within the E3 zone 0.9:1, which is 244.25m<sup>2</sup> in excess of the standard at cl 4.4 of the WLEP and 183.7m<sup>2</sup> in excess of that permitted when the bonus at s 16 of the Housing SEPP is accounted.
- 22 I am satisfied that the Church has demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case because the objectives of the FSR standard at cl 4.4 of the WLEP are achieved notwithstanding the non-compliance with standard.
- 23 The objectives at cl 4.4 of the WLEP are:
- (a) to provide an appropriate correlation between the size of a site and the extent of any development on that site,

(b) to establish the maximum development density and intensity of land use, taking into account the availability of infrastructure to service that site and the vehicle and pedestrian traffic the development will generate,

(c) to ensure buildings are compatible with the bulk and scale of the locality.

- 24 In respect of objective (a), the written request asserts that the correlation of site size and extent of development is appropriate given the site is consolidated to form a large corner parcel that is substantially within the Wollongong City Centre, and the GFA proposed on the larger portion of the site located in the E2 zone is less than permitted. That deficit is not greater than the excess GFA proposed on the land zoned E3.
- 25 In respect of objective (b), the exceedance is said to be minor when the GFA of the proposed development is considered as a whole, and where the location is supported by infrastructure such as public transport and where the site is capable of accommodating services such as waste and carparking on site, and where flood conveyance is likewise integrated into the development on the site.
- 26 In respect of objective (c), the modulation of the built form transitions from a tower that complies with the height standard, to a podium within the E3 land that does not add to the visual bulk and which, on the basis of shadow diagrams and views from the sun diagrams demonstrate would unreasonably obstruct views or sunlight to surrounding buildings or the public domain.
- 27 Additionally, I am satisfied the objectives of the standard at s 16 of the Housing SEPP is also achieved by the provision of 12 affordable housing units in answer to the objective to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.
- 28 I am also satisfied that the environment planning grounds advanced in the written request are sufficient to justify the contravention for reasons summarised as follows:
- (1) The land within the E3 zone is a narrow parcel that was formerly a road reserve and is not perceived as distinct from the parcel of land in the E2 zone with which the E3 land is now to be amalgamated.
  - (2) Strict compliance with the FSR standard on the land zoned E3 would likely result in a frontage that is not activated at a prominent location on Ellen Street, contrary to the Wollongong City Centre Urban Design Framework that otherwise applies to the land zoned E2.
  - (3) When the FSR of the development on the site is understood as a whole, the development does not propose more GFA than is permitted if distributed differently, and the exceedance is a two storey element read against a taller tower development so that the bulk resulting from the exceedance is not other than compatible with the locality's evolving scale.
  - (4) While the written request asserts that the exceedance is due to a history and characteristics unique to the site, the Court understands this reference to be instead a consistency with development approved in Ellen Street that likewise

locates development of similar scale and setback within the land zoned E3, such as in *Wollongong Invest Land No.3 Pty Ltd v Wollongong City Council* [2022] NSWLEC 1425.

29 While other grounds are argued, the grounds summarised above are sufficient to justify the breach of the standard and I am satisfied the written request should be upheld. In reaching this conclusion, I note the provision by the Church of the following Reduced Levels at the roof level of the development proposed in the land zoned E3 that is not otherwise denoted on the architectural plans:

(1) Top of roof slab – RL 21.180

(2) Top of parapet – RL 21.250

30 A slight fall in the site from north to south results in lower topography fronting Ellen Street where the site is identified to be flood affected and to be located within the Flood Risk Management Manual to which the provisions at cl 5.21 of the WLEP are directed. The Flood Assessment and Flood Emergency Response Plan prepared by Martens dated 15 August 2025 (Flood Report) describes flood mitigation design details, including flood storage and flow conveyance to the north of the site and a flood plenum to be located along Ellen Street. On the basis of the Flood Report and the substantial agreement recorded in a joint expert report of the stormwater experts engaged by the parties in this matter, I am satisfied that the development is compatible with the flood function and behaviour on the land, and will not adversely affect flood behaviour in a way that results in detrimental increases in the potential flood affectation of other development or properties, and when the particulars of the Flood Emergency Response Plan are understood, the development will not adversely affect the safe occupation and efficient evacuation of people or exceed the capacity of existing evacuation routes for the surrounding area in the event of a flood, and incorporates appropriate measures to manage risk to life in the event of a flood. Finally, I am satisfied that the development

will not adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses.

31 I have also considered those matters at cl 5.22(3) of the WLEP relating to special flood considerations and for reasons identical to those listed above, conclude those matters are adequately addressed.

32 The site is substantially within the Wollongong City Centre and is currently serviced by public utility infrastructure of a kind required to be made available when it is required. Such that the Court can be satisfied such infrastructure will be available.

33 The site is not identified on the relevant Acid Sulfate Soils map at cl 7.5(2) of the WLEP.

34 I have considered those matters at cl 7.6(3) of the WLEP, and on the basis of the following reports that are incorporated into the agreed conditions of consent, I conclude that the earthworks will not have a detrimental impact on environmental function and processes, neighbouring uses, heritage items or on features of surrounding land:

- (1) The Preliminary Geotechnical Investigation report prepared by Morrow Geotechnics, dated 23 July 2023, with recommendations contained on p 9.
- (2) A Site Hydrology Report by the same author dated 3 May 2024 with groundwater observations from five boreholes and a De-Watering Management Plan also prepared by Morrow Geotechnics dated 3 May 2024 which concludes groundwater seepage volumes are such that a Water Access Licence exemption is required, and condition of consent is proposed accordingly to obtain the required licences and/or approvals under the Water Management Act 2000 from Water NSW.
- (3) An Engineer's Excavation Methodology Report prepared by ATB Consulting Engineer's dated 15 August 2025 that describes the proposed secant pile shoring system and tanked basement, and the current state of repair of the box culverts located to the north of the site that are not expected to be impacted by excavation.

35 On the basis of the dimensions shown on the detailed plan at Section 3.2 of the Urban Design Report prepared by Dickson Rothschild dated 14 August 2025, I am satisfied that the site has a frontage to Auburn and Ellen Streets that is greater than 24m as required by cl 7.14(2)(b) of the WLEP.

36 As the proposal is for a new building on a site is within the Wollongong City Centre, the provisions of cl 7.18 of the WLEP dealing with design excellence apply.

37 An assessment against the provisions at cl 7.18, prepared by Dickson Rothschild dated 10 November 2025, addresses the framework for deciding whether a development exhibits design excellence as shown in *Toga Penrith Developments Pty*



*Limited v Penrith City Council* [2022] NSWLEC 117 (“*Toga*”) (*Toga*, at [70]) and assists the Court in having regard to the particular terms of, and answer the particular questions raised by, the matters in the design excellence provisions (*Toga*, at [75]). Likewise, experts in town planning consider the provisions at cl 7.18 of the WLEP in the joint expert report filed with the Court on 24 October 2025 and conclude that amendments contained in architectural plans annexed to the expert report resolve the issues for which Council contended the proposal failed to exhibit design excellence.

I am satisfied that the proposal achieves a high standard of architectural design, materials and detailing appropriate to the building type and location, and will also improve the quality and amenity of the public domain because of the form and external appearance of the proposed development. In forming this opinion:

- (1) I accept that the arrangement of built form into a podium that addresses both Auburn and Ellen Streets, with taller built form above that conforms to the setbacks and separation desired by the Apartment Design Guide are an appropriate form of bulk and massing for the building type and location, consistent with the Wollongong City Centre Urban Design Framework and so demonstrates development suitable to the site.
- (2) The parties do not identify any view corridors that would be detrimentally affected by the development, does not overshadow land identified on the relevant sun plane protection map or Overshadowing Map, and is not a site to which heritage provisions at cl 5.10 of the WLEP apply.
- (3) I have also had regard to the matters listed at cl 7.18(4), and note that streetscape constraints include flood affectation requiring elevated entry and a plenum undercroft to ensure flow conveyance across the site.

### **State Environmental Planning Policy (Transport and Infrastructure) 2021**

The site is adjacent to an existing substation and existing overhead power lines are within 5m of where development works are proposed. For these reasons, s 2.48 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport SEPP) applies to require written notice to be given to the relevant electricity supply authority.

On 8 March 2024, Endeavour Energy provided a written response in relation to the proposed development. These comments have been considered and incorporated in the proposal such as the undergrounding of powerlines to Auburn Street, imposed at Condition 26 of the agreed conditions of consent.

As the site is located approximately 100m from the Wollongong Rail Corridor, s 2.100 of the Transport SEPP applies to the development.

The development is supported by the following acoustics assessments prepared by ANAVS-Acoustic Noise and Vibration Solutions Pty Ltd that satisfy me that the proposed development will comply with the noise criteria at s 2.100(3), subject to

adopting those recommendations:

- (1) Acoustic Report DA Submission prepared by dated 17 November 2023
- (2) Noise and Vibration Management Plan during the Demolition, Excavation and Construction of the proposed development at No.23-27 Auburn St & 38 Ellen St Wollongong dated 8 August 2025.

### **The design of residential apartment development**

- 44 As the proposed development includes residential apartment development, the Court is required by s 147 of State Environmental Planning Policy (Housing) 2021 (Housing SEPP) to consider the quality of the design of the development, evaluated in accordance with the design principles at Sch 9.
- 45 I am assisted in so doing by a statement dated 11 November 2025 and prepared in accordance with s 29 of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation) that attests Mr Robert Dickson (Arch Reg No. 5364) directed the design of the proposal, and sets out the means by which the design principles have been applied in the proposed development, and how the objectives in Parts 3 and 4 of the Apartment Design Guide are addressed.
- 46 The Council's Design Review Panel has considered the proposal and provided advice on the design. As stated at [37], the parties agree that the proposal demonstrates design excellence in accordance with cl 7.18 of the WLEP, for reasons that are set out in the statement prepared by Mr Dickson and on the basis of which the Court is able to form an opinion of satisfaction that the proposed development exhibits design excellence.
- 47 On the basis of the statement at [42], I am also satisfied the development as proposed meets the requirements set out in s 148 of the Housing SEPP.

### **State Environmental Planning Policy (Resilience and Hazards) 2021**

- 48 I have considered whether the land is contaminated in accordance with s 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021.
- 49 On the basis of the Preliminary (Stage 1) Site Investigation prepared by Aargus Engineering dated 20 December 2023, the Detailed Site Investigation prepared by Aargus dated 12 February 2025 (the DSI), and the Remediation Action Plan prepared by GSNE Services dated 17 February 2025, and agreed conditions of consent including, but not exhaustively, Conditions 108 and 109, I am satisfied that the site can be made suitable for the proposed use once remediated.

### **State Environmental Planning Policy (Sustainable Buildings) 2022**

- 50 The application is accompanied by a BASIX certificate for 61 dwellings (Cert No. 1729798M\_02 prepared by EPS and dated 12 August 2025) in accordance with State Environmental Planning Policy (Sustainable Buildings) 2022 (Sustainable Buildings

SEPP).

- 51 The BASIX certificate quantifies embodied emissions such that the Court can be satisfied that the embodied emissions attributable to the proposed development have been quantified in accordance with s 2.1(5) of the Sustainable Buildings SEPP.

## Conclusion

- 52 As the parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.
- 53 In making the orders to give effect to the agreement between the parties, I was not required to, and have not, made any merit assessment of the issues that were originally in dispute between the parties.
- 54 The Court notes:
- (1) that Wollongong City Council, exercising the functions of the relevant consent authority, the Southern Regional Planning Panel, has approved, under s 38(1) of the Environmental Planning and Assessment Regulation 2021 (NSW), the amendment of Development Application DA-2024/26 by those amended plans and other documents listed in Annexure A.
  - (2) The amended plans and other documents were filed with the Court on 18 November 2025.

## Orders

- 55 The Court orders that:
- (1) The Applicant's written request, pursuant to clause 4.6 of the Wollongong Local Environmental Plan 2009 (LEP) to vary the development standard for floor space ratio contained in clause 4.4 of the LEP as prepared by MMJ Planning dated 18 August 2025 is upheld.
  - (2) In accordance with section 8.15(3) of the *Environmental Planning & Assessment Act 1979* (NSW), the Applicant is to pay the Respondent's costs thrown away as a result of the amendments in Annexure A, and on 25 August 2025, in the sum of \$33,000, to be paid within 60 days from these orders.
  - (3) The appeal is upheld.
  - (4) Development Application DA-2024/26 for demolition of existing structures, and construction of a 16-storey mixed-use building comprising 5 levels of commercial premises, 61 shop top housing residential apartments (including 12 affordable dwellings), communal spaces and 4 levels of basement car parking with associated earthworks, landscaping, service infrastructure and stormwater drainage works at 23-27 Auburn Street and 38 Ellen Street Wollongong, is determined by the grant of consent subject to conditions contained in Annexure B.

**T Horton**

**Commissioner of the Court**

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[Annexure A \(124 KB,.pdf\)](#)

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Decision last updated: 10 December 2025