



Land and Environment Court
New South Wales

Case Name: Wollongong Invest Land No.3 Pty Ltd v Wollongong City Council

Medium Neutral Citation: [2022] NSWLEC 1425

Hearing Date(s): Conciliation conference held on 3 and 4 August 2022

Date of Orders: 16 August 2022

Decision Date: 16 August 2022

Jurisdiction: Class 1

Before: Walsh C

Decision: See orders at [48] below

Catchwords: DEVELOPMENT APPLICATION – mixed use development – two residential towers comprising 263 apartments – 100 place child care centre – conciliation conference – agreement between the parties – orders

Legislation Cited: Education and Care Services National Regulations 2011
Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7, 8.15
Environmental Planning and Assessment Regulation 2000, cl 3, 50, 55
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development, cl 28
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
State Environmental Planning Policy (Transport and Infrastructure) 2021, s 2.45, 2.122, Sch 9
Wollongong Local Environmental Plan 2009, cll 2.3, 2.7, 4.3, 4.4, 4.4A, 4.6, 5.10, 7.1, 7.6, 7.13, 7.18, 8.4, 8.6

Cases Cited: Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61
Wehbe v Pittwater Council (2007) 156 LGERA 446;
[2007] NSWLEC 827

Texts Cited: NSW Department of Planning and Environment,
Apartment Design Guide (July 2015)
NSW Department of Planning and Environment, Child
Care Planning Guideline (August 2017)
Wollongong Development Control Plan 2009

Category: Principal judgment

Parties: Wollongong Invest Land No.3 Pty Ltd (Applicant)
Wollongong City Council (Respondent)

Representation: Counsel:
B Salon (Solicitor) (Applicant)
H Irish (Respondent)

Solicitors:
Mills Oakley (Applicant)
Wollongong City Council (Respondent)

File Number(s): 2021/354090

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** These proceedings are an appeal brought under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of Development Application No. DA-2020/677 (DA) by the Southern Regional Planning Panel. Wollongong City Council is the respondent to the appeal by virtue of s 8.15(4) of the EPA Act, albeit subject to the control and direction of the Panel in connection with the conduct of the appeal.
- 2 The DA seeks consent for the demolition of existing structures, and construction of a mixed use development at 30 Ellen Street Wollongong, legally identified as Lot 1 DP 1256499 (site). The site area is 6469m² (Drawing A 02). The proposal comprises 'shop top housing', with six retail spaces at the ground floor, 263 residential apartments, a 100 place childcare centre, two levels of basement parking and sleeved parking at Levels 1 and 2 for a total of 337

vehicles. The form of the building would comprise two towers with a 5 storey podium. Each of the towers would be 18 storeys (including podium levels). The child care centre would occupy Level 3 within the western tower with outdoor play spaces also on Level 3, occupying the northern section of the podium rooftop. A landscaped communal open space area would also occupy part of the podium rooftop. Certain public domain works are proposed to the street frontages of the site including street tree planting.

- 3 The Court arranged a conciliation conference between the parties under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act), which was held on 3 and 4 August 2022, and at which I presided. The conference was conducted on the Microsoft Teams platform.
- 4 After the conciliation conference, the parties filed an agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. This decision involved the Court upholding the appeal and granting development consent to the development application, as amended, subject to conditions.
- 5 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.

Amendments to the development application

- 6 The Court notes the advice from the parties that the Southern Regional Planning Panel, as the relevant consent authority, has agreed under cl 55(1) of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation), to the applicant amending the DA in accordance with the plans and documents listed in the agreed conditions of consent (Condition 1 in Annexure A to this judgment). The Court also notes that the applicant uploaded the Amended Development Application to the NSW Planning Portal on 3 August 2022. Of relevance to s 8.15(3) of the EPA Act and costs orders, the Court has subsequently "allowed" the applicant to file Amended Development Application as now documented at Condition 1 in Annexure A. This documentation was filed on 2 August 2022.

Jurisdiction

- 7 The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the DA, as now amended. There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties sought to assist here by compiling a "jurisdictional statement" (received by email 3 August 2022). Mindful of this advice, I find as follows in regard to jurisdiction.

State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience and Hazards)

- 8 Clause 4.6 of the SEPP Resilience and Hazards requires that a consent authority must not grant consent to any development on land unless it has considered whether a site is contaminated land or potentially contaminated land, and if it is, that it is satisfied that the land is suitable (or will be after undergoing remediation) for the proposed use.
- 9 A Detailed Site Investigation prepared by EI Australia dated 9 June 2022 concluded that contamination was present at the site and remediation was required. The applicant has now provided the respondent with a Remediation Action Plan (Tab 6, Amended Application filed in hard copy with the Court on 2 August 2022) and which has been incorporated into the Conditions of Consent (See Deferred Commencement Condition (i) and condition 1).
- 10 The respondent is satisfied of the matters set out in cl 4.6 of the SEPP Resilience and Hazards. I concur and find that the requirements of SEPP Resilience and Hazards, as relevant, are addressed.

State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65)

- 11 In regard to SEPP 65 and relevant provisions of the EPA Regulation, the applicant has provided a Design Verification Statement, referencing the amended application, which meets the requirements of cl 50(1A) and 50(1AB) of the EPA Regulation (Tab 11, Amended Application filed with the Court in hard copy on 2 August 2022, prepared by a Registered Architect with reference number: 6763).

- 12 Mindful of cl 28 of SEPP 65, I have also considered the advice of the Wollongong Design Review Panel (Panel) (meetings dated 24 August 2020, 25 February 2021, 25 August 2021, 25 November 2021) and I have considered the design quality of the development when evaluated in accordance with the design quality principles, and the Apartment Design Guide (ADG). I believe that adequate regard has been had to the advice of the Panel and the design quality principles, and the ADG. I have been aided in my finding here by oral and written advice provided by the urban design specialists appointed by the respondent and applicant (oral advice was provided during the conciliation conference and written advice was provided as an attachment to the jurisdictional statement).

State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP Transport and Infrastructure)

- 13 In accordance with s 2.45, the DA was referred to Endeavour Energy for comment as it may involve works within proximity of electricity infrastructure. Endeavour Energy raised no objection to the proposed development subject to certain requirements which have been incorporated into agreed conditions (Annexure A Conditions 21 and 22).
- 14 The parties advise that the proposed development is considered a traffic generating development under Sch 3. In accordance with s 2.122, the respondent provided written notice of the proposal to Transport for NSW and received a response advising that it had no objection to the development in principle. The respondent is satisfied of the matters listed in s 2.122(4)(b) in relation to traffic accessibility and safety, and mindful of this considered position, I too have given consideration to the relevant provisions.
- 15 Chapter 3 is concerned with educational establishments and child care facilities. Pursuant to the savings and transitional provisions within Sch 9, the provisions of Ch 3 do not apply to the DA, as it was made but not finally determined before the commencement of Ch 3 on 1 March 2022. However, under subsection 1(2) of Sch 9, before determining a DA for a centre-based child care facility, made but not finally determined before the commencement of Ch 3, the consent authority must take into consideration the regulatory requirements and the National Quality Framework Assessment Checklist set

out in Part 4 of the Child Care Planning Guideline, in relation to the proposed development.

- 16 Matters relating to compliance with the Child Care Planning Guideline are referred to on pp14 and 15 of the Joint Town Planners Expert Report filed on 22 July 2022. The respondent has assessed the DA, as amended, against the regulatory requirements and the National Quality Framework Assessment Checklist set out in Part 4 of the Child Care Planning Guideline and is satisfied that the DA, as amended, complies with the requirements, including and the physical environment requirements of the Education and Care Services National Regulation (2011). As required, I have taken into consideration the matters listed at subs 1(2) of Sch 9.

BASIX affected development

- 17 The proposal is BASIX affected development as defined at cl 3 of the EPA Regulation. An updated BASIX Certificate and updated BASIX Certificate stamped plans have been provided following the amendments to the architectural plans (Tab 8, Amended Application filed with the Court in hard copy on 2 August 2022).

Wollongong Local Environmental Plan 2009 (WLEP)

- 18 The bulk of the site falls within Zone B3 – Commercial Core. However, a strip of land within the site, along Ellen Street, is zoned B6 Enterprise Corridor and is located outside of the identified Wollongong City Centre. As expanded upon later, this zone differentiation within the site is replicated in regard to floor space ratio (FSR) and building height controls. I note here that I have had regard to the zone objectives relating to each of the zones mindful of cl 2.3(2). Shop top housing development is permissible in each zone with consent and demolition is permissible with consent under cl 2.7.
- 19 Further in regard to WLEP, I note as follows:
 - (1) Under cl 4.3, the portion of the site zoned B3 is subject to a maximum height of buildings control of 60m and the portion of the site zoned B6 is subject to a maximum building height of 9m. The part of the proposed development located in the B3 zone is compliant with the prescribed 60m maximum building height. The part of the proposed development located in the B6 zone ranges from 11.3m to 20.26m. The applicant relies on the cl 4.6 written request prepared by Planning Ingenuity dated

20 July 2022 in support of the variation of the height development standard.

- (2) Under to cl 4.4 and 4.4A of the WLEP 2009, the portion of the site zoned B3 is subject to a maximum FSR control of 3.695:1 and the portion of the site zoned B6 is subject to a maximum FSR control of 0.5:1. The overall development complies with a 3.695:1 FSR, however the part of the development located in the B6 zone provides an FSR of 1.067:1. The applicant relies on a separate cl 4.6 written request prepared by Planning Ingenuity also dated 20 July 2022 in support of the variation of the FSR standard.
- (3) Mindful of cl 5.10, the site is not identified as a heritage item, nor is the site located within a heritage conservation area.
- (4) Notwithstanding that neither cl 5.21 nor repealed cl 7.3 strictly applies to the DA, the respondent advises that it has assessed the development application, as amended, against both of these clauses (in addition to the relevant provisions of WDCP), to determine its suitability from a flood planning perspective.
- (5) Under cl 7.1, the consent authority must be satisfied that essential public utility infrastructure for the proposal is available, or will be available when required. I accept the advice of the parties that essential public utility infrastructure is available to the site.
- (6) The proposed earthworks have been assessed in accordance with cl 7.6. The following conditions have been designed to address matters relating to this cl: Conditions 7, 15, 16, 17 and 87.
- (7) In accordance with cl 7.13, the proposal provides active uses at ground floor level to each of the three street frontages which encourage the presence and movement of people. I am satisfied in regard to the requirements of this clause.
- (8) Mindful of cl 7.18, the respondent advises that it is now satisfied that the proposal, as amended, exhibits design excellence having regard to the matters set out in subcl (4). I too am satisfied that the proposed development exhibits design excellence. In coming to this view, I have had regard to the matters listed at subcl (4). But I have also had regard to the oral and written advice provided by the urban design experts appointed by the parties. The oral advice was provided during the course of the conciliation conference. The written advice was provided as Attachment A to the jurisdictional statement prepared by the parties. This advice makes clear that a sound design process was followed, informed by the Wollongong Design Review Panel and aligning the requirements of the ADG and the sensitivities of this large site. The final design outcome achieves the requirements for design excellence.
- (9) Part 8 applies to the site as it is identified as part of the Wollongong City Centre. The proposal complies with cl 8.4 in relation to minimum building street frontage. The development is compliant with cl 8.6 in relation to building separation because no part of the building is built to the street alignment.

Development standard contraventions

- 20 As foreshadowed above, there is a differentiation of building height and FSR development standards within the site. A strip of land running along Ellen Street, subject to a maximum building height control of 9m under cl 4.3, would involve a maximum building height of 20.26m. The same strip of land is subject to a maximum FSR control of 0.5:1 but is calculated to have an FSR of 1.067:1.
- 21 The applicant is seeking an exception for the contravention of these development standards under cl 4.6(2) of the WLEP. The applicant relies on two written requests, as introduced above. Henceforth I will refer to the written requests applying to the building height and FSR contraventions as Written Request 1 and Written Request 2, respectively.
- 22 While the parties believe the requirements of cl 4.6 are satisfied and that the proposal can be approved notwithstanding these development standard contraventions, I need to make my own findings in regard to the relevant jurisdictional tests.

Contravention of clause 4.3 of WLEP in regard to building height

- 23 Written Request 1 adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (a requirement of cl 4.6(3)(a) of WLEP). It does so mindful of Preston CJ's findings in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (*Wehbe*). Written Request 1 uses the first "*Wehbe* way", to show how the development achieves the objectives of the standard, notwithstanding the contravention. The nominated objectives to cl 4.3 are:
- (a) to establish the maximum height limit in which buildings can be designed and floor space can be achieved,
 - (b) to permit building heights that encourage high quality urban form,
 - (c) to ensure buildings and public areas continue to have views of the sky and receive exposure to sunlight.
- 24 I agree with Written Request 1 that Objective (a) is concerned with explaining the approach or function of the height of building standard. Clause 4.3 already achieves the objective of establishing a maximum building height for the site.

This is a similar setting to the findings of Preston CJ in *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at par 49.

- 25 In regard to Objective (b), Written Request 1 refers to the design qualities of the development generally, and also points specifically to the appropriateness of the distribution of building massing across the site, an important positive attribute agreed by the various design specialists. These arguments demonstrate that Objective (b) is achieved. In coming to my conclusion, I have had regard to the oral and written advice of the urban design specialists, as indicated above, which is confirmatory of Written Request 1 on this point.
- 26 In regard to Objective (c), Written Request 1 again refers to the design qualities of the adopted building massing and its positive relationship with other buildings and public areas. It is also noted that the proposed building height contravention would not cause any unreasonable increase in overshadowing of neighbouring properties or public areas. Objective (c) is achieved notwithstanding the contravention.
- 27 Written Request 1 also adequately demonstrates that there are sufficient environmental planning grounds to justify the breach of the standard (cl 4.6(3)(b) of WLEP). Written Request 1 argues as follows (p 8):
- “The height non-compliance is a product of an anomaly in the planning controls. The height controls appear to have been based on the boundary of the road reserve of Ellen Street, however that has changed to include the subject site. Logically, the height controls would follow the boundary of the road reserve. The height breach is therefore of a technical nature and results from a change in cadastral boundaries.”
- 28 In the circumstances, and as demonstrated in Written Request 1, adoption of the applicable building height development standard for the applicable narrow sector of the site along Ellen Street would comprise the adoption of an inappropriate design constraint and compromise design opportunities. While other grounds are argued, the grounds nominated above are sufficient to justify the breach of the standard.
- 29 Clause 4.6(4)(a)(ii) of WLEP seeks a direct finding from the consent authority that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the zone objectives.

30 For the reasons outlined in Written Request 1 and explained above, I am satisfied that the development is consistent with the objectives of the building height standard which is contravened.

31 I also find the development consistent with the objectives for development within the applicable zone. The objectives of the B6 Enterprise Corridor zone are as follows:

- To promote businesses along main roads and to encourage a mix of compatible uses.
- To provide a range of employment uses (including business, office, retail and light industrial uses).
- To maintain the economic strength of centres by limiting retailing activity.
- To encourage activities which will contribute to the economic and employment growth of Wollongong.
- To allow some diversity of activities that will not—
 - (a) significantly detract from the operation of existing or proposed development, or
 - (b) significantly detract from the amenity of nearby residents, or
 - (c) have an adverse impact upon the efficient operation of the surrounding road system.

32 The proposal provides for a mixture of business (retail uses at the ground level and a large child care centre on Level 3) and residential uses designed to achieve compatibility concerns, consistent with the first two zone objectives. Retailing activities are essentially limited to the ground floor consistent with the third zone objective. The mixture of business and service activities will diversify the amount of floor space available to businesses and contribute to the economic and employment growth of Wollongong, consistent with the fourth zone objective. The proposal is also consistent with the fifth zone objectives, because: (a) the scale of the commercial activities would not significantly detract from the operation of existing or proposed development, (b) the planning experts agree that the design scheme is such as to provide for reasonable amenity outcomes for nearby residents and (c) the traffic specialists engaged by the parties agree that the proposal provides for a satisfactory outcome in terms of traffic management.

- 33 In accordance with the above findings, I have formed the required two positive opinions of satisfaction under cl 4.6(4)(a)(ii). I am of the opinion that the proposal is in the public interest because it is consistent with the objectives of the relevant development standard and the objectives for development within the relevant zones.
- 34 When a matter is on appeal, the Court is not required to obtain the concurrence of the Secretary (cl 4.6(4)(b)), however it should still consider the matters in cl 4.6(5). I have done so and see no matters of relevance therein.
- 35 In accordance with the above findings, the conditions which are required to be satisfied before the permissive power in cl 4.6(2) comes into effect have been met. This enlivens the power of the Court to grant development consent notwithstanding its contravention of the maximum building height standard.

Contravention of clause 4.4 of WLEP in regard to FSR

- 36 Written Request 2 adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (a requirement of cl 4.6(3)(a) of WLEP), again using the first *Wehbe* way, to show how the development achieves the objectives of the standard, notwithstanding the contravention. The nominated objectives to cl 4.4 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.
- 37 I agree with Written Request 2 that Objective (a) is concerned with the development of a “site”. In this instance, and as indicated in Written Request 2, the proposal is compliant with the maximum FSR applicable across the whole site under WLEP. Accordingly, the development accommodates the correlation between site size and intended extent of development “on that site”.
- 38 In regard to Objective (b), I agree with Written Request 2 that the proposed density and intensity of development over the site is consistent with the

planned intentions. Written Request 2 confirms the availability of infrastructure and that vehicle and pedestrian traffic considerations have been addressed.

39 In regard to Objective (c), Written Request 2 refers to the massing scheme for the proposal as developed in the design process and its accommodation of compatibility concerns including in regard to scale and bulk, successfully arguing that this objective is also achieved.

40 Written Request 2 also adequately demonstrates that there are sufficient environmental planning grounds to justify the breach of the standard (cl 4.6(3)(b) of WLEP). Written Request 2 argues as follows (p 7):

“The proposed development is entirely compliant with the maximum FSR prescribed across the entire site pursuant to Clause 4.4A of WLEP 2009. The non-compliance with Clause 4.4 and 4.4A only applies when looking at the B3 and B6 zoned parts of the site in isolation and is solely a technical noncompliance. Given that the proposal complies with the prescribed FSR across the whole site, the development provides a density that is anticipated by the planning controls that apply to the site.”

41 While other grounds are argued, the grounds nominated above are sufficient to justify the breach of the standard. In the circumstances, and as demonstrated in Written Request 2, adoption of the applicable FSR development standard for the applicable narrow sector of the site along Ellen Street would comprise the adoption of an inappropriate design constraint for the site.

42 I am also satisfied that the development will be in the public interest because it is consistent with the objectives of the FSR standard and the zone objectives. For the reasons outlined in Written Request 2 and explained above, I am satisfied that the development is consistent with the objectives of the FSR standard. I have already found that the development consistent with the objectives for development within the applicable B6 Enterprise Corridor zone.

43 In accordance with the above findings, the conditions which are required to be satisfied before the permissive power in cl 4.6(2) comes into effect have been met. This enlivens the power of the Court to grant development consent notwithstanding its contravention of the FSR standard.

Remaining considerations under s 4.15(1) of the EPA Act

- 44 Under cl 4.15(1)(d) of the EPA Act, I am required to consider objecting submissions. The DA has been notified a number of times, as amendments to the proposal have been advanced. The respondent advises that it is satisfied that the DA, as amended, adequately addresses the matters raised in the public submissions that are capable of being addressed and that can reasonably be expected to be addressed, having regard to the planning control context, which, for example, enables a 60m height limit and 3.697:1 FSR for that part of the site zoned B3. During the conciliation conference the respondent's planning expert took me through the objecting submissions, explaining how they were able to be addressed or otherwise. The requirements of cl 4.15(1)(d) have been satisfied.
- 45 Mindful of subs 4.15(1)(a)(iii), the parties have advised me that the provisions of Wollongong Development Control Plan 2009 that are of relevance were taken into account in assessing the DA in preparing the Conditions of Consent now agreed.
- 46 I have also given attention to the likely impacts of the proposal, site suitability and the public interest, mindful of the requirements of subs 4.15(1)(b), (c) and (e) of the EPA Act.

Conclusion

- 47 I am satisfied that the parties' decision is a decision that the Court could have made in the proper exercise of its functions. Therefore, under s 34(3) of the LEC Act, I am required to dispose of the proceedings in accordance with the parties' decision. Further, 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(1) of the EPA Act.
- 48 The Court orders that:
- (1) Pursuant to section 8.15(3) of the *Environmental Planning and Assessment Act 1979*, the Applicant is allowed to file the Amended Development Application, relevantly comprising the plans and documents listed in Condition 1 of Annexure A.

- (2) The Applicant is to pay the Respondent's costs thrown away in accordance with section 8.15(3) of the *Environmental Planning and Assessment Act 1979* in the agreed amount of \$3545.
- (3) The Applicant's written request by Planning Ingenuity dated 20 July 2022 to vary the height of buildings standard under clause 4.3 of Wollongong Local Environmental Plan 2009, pursuant to clause 4.6 of Wollongong Local Environmental Plan 2009, is upheld.
- (4) The Applicant's written request by Planning Ingenuity dated 20 July 2022 to vary the floor space ratio standard under clause 4.4 of Wollongong Local Environmental Plan 2009, pursuant to clause 4.6 of Wollongong Local Environmental Plan 2009, is upheld.
- (5) The Appeal is upheld.
- (6) Development Application No DA-2020/677 for the demolition of existing structures and the construction of mixed use development comprising two 17 storey towers with podium and six (6) retail spaces, 263 residential apartments, a 100 place child care centre, two (2) levels of basement parking and sleeved parking on Levels 1 and 2 and associated landscape and site works at 30 Ellen Street, Wollongong is approved subject to the conditions in **Annexure A**.

.....

P Walsh

Commissioner of the Court

[Annexure A \(486831, pdf\)](#)

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.