



Land and Environment Court  
New South Wales

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Case Name: Wohl Investments Pty Ltd v Liverpool City Council

Medium Neutral Citation: [2023] NSWLEC 1614

Hearing Date(s): Conciliation conference on 6 October 2023

Date of Orders: 18 October 2023

Decision Date: 18 October 2023

Jurisdiction: Class 1

Before: Walsh C

Decision: The Court orders that:  
(1) The written request pursuant to cl 4.6 of Liverpool Local Environmental Plan 2008, dated 16 June 2023 and prepared by Higgins Planning is upheld.  
(2) That the applicant is to pay to the respondent's costs thrown away as a result of the amendment of the application pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979 as agreed or assessed.  
(3) The appeal is upheld.  
(4) Development application DA-42/2021, as amended, for the demolition of existing buildings and structures, construction and operation of a seniors housing development involving a 108 room residential care facility in a three-storey building over a basement, together with associated facilities, access, and landscaping under State Environmental planning Policy (Housing for Seniors or People with a Disability) 2004 at 173 Elizabeth Drive and 18 Woodlands Road, Liverpool, is determined by the grant of consent, subject to the conditions of consent at Annexure A.

Catchwords: APPEAL – development application – conciliation conference – agreement between the parties – orders

Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 4.16, 8.7, 8.15 Environmental Planning and Assessment Regulation 2000, cl 55 Land and Environment Court Act 1979, s 34 Liverpool Local Environmental Plan 2008, cll 2.3, 2.7, 4.6 State Environmental Planning Policy (Housing) 2021 State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, cll 5, 26, 28, 30, 40, 48 State Environmental Planning Policy (Resilience and Hazards) 2021, Ch 4, s 4.6 State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.48, 2.119
Cases Cited:	Ku-ring-gai Council v Pathways Property Groups Pty Ltd [2018] NSWLEC 73 Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827
Category:	Principal judgment
Parties:	Wohl Investments Pty Ltd (Applicant) Liverpool City Council (Respondent)
Representation:	Counsel: A Boskovitz (Solicitor) (Applicant) C Campbell (Solicitor) (Respondent)  Solicitors: Boskovitz Lawyers (Applicant) Liverpool City Council (Respondent)
File Number(s):	2022/375342
Publication Restriction:	No

## JUDGMENT

- 1 **COMMISSIONER:** These proceedings, brought under Class 1 of the Court's jurisdiction, are an appeal pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) in regard to the applicant's dissatisfaction with the determination by Sydney Western City Planning Panel (the Panel) to refuse to grant consent to DA-42/2021 (the DA), applying to land legally

described as Lot 3 in DP 651870 and Lot E in DP 36731, with street addresses of 173 Elizabeth Drive and 18 Woodlands Road, Liverpool, respectively (the site).

- 2 While the Panel is the consent authority in relation to the DA, by virtue of s 8.15(4) of the EPA Act, Liverpool City Council (Council) is the respondent to this appeal.
- 3 The original DA sought consent for the demolition of existing buildings and structures, construction and operation of a seniors housing development involving a 116 room residential care facility in a three-storey building over a basement, together with associated facilities, access, and landscaping.

### **Agreement reached**

- 4 Recently, the parties indicated to the Court that, based on certain amended plans and further supplied information, they had reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. In response to this, the matter was listed for a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act). I was appointed to preside.
- 5 At the conciliation conference, and by way of an agreed jurisdictional statement provided to the Court on 4 October 2023, the parties outlined the particulars of their agreed decision. In the broad I can note that the applicant sought to amend the application and Sydney Western City Planning Panel, has agreed, to a series of nominated amendments to architectural and landscape plans together with other documents including a contamination report, acoustic report (and peer review), and mechanical engineering documents (henceforth, the amended plans). The parties agree that the amended plans would reduce the bulk and scale of the proposal, reduce the number of rooms to 108, reduce the extent of the breach of the applicable building height standard, provide additional internal amenity for residents and, when compared to the original DA, provide for an improved streetscape outcome on Elizabeth Drive.
- 6 The parties agree that all contentions raised in Council's statement of facts and contentions filed on 5 June 2023 have been resolved with the amended DA. This agreed decision of the parties involves the Court upholding the appeal and

granting development consent to the DA under s 4.16 of the EPA Act, subject to agreed conditions.

- 7 Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision, provided it is a decision that the Court could have made in the proper exercise of its functions.

### **Jurisdiction**

- 8 There are certain jurisdictional pre-requisites which require attention before this function can be exercised. The parties outlined matters of relevance in these proceedings in their jurisdictional statement. Regarding jurisdiction, and noting this advice, I am satisfied in regard to the matters listed below.

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

- 9 In regard to Ch 4 of State Environmental Planning Policy (Resilience and Hazards) 2021 (concerned with remediation of land) and s 4.6(1), the consent authority must not grant consent to development unless it has considered whether the subject land is contaminated and, subject to its status of contamination, is satisfied that the land is or will be made to be suitable for the development. Further, the parties advise that part of the site is "land" affected by s 4.6(4) and in turn the provisions of s 4.6(2) apply. In respect to the latter, the parties advise and I accept that the required preliminary site investigation of the land concerned has been undertaken; and indeed a detailed site investigation with respect to contamination has been undertaken with respect to the whole of the site. In light of these investigations, and the incorporation of relevant conditions which bring upon the applicant a requirement to comply with relevant recommendations, the parties are satisfied that the provisions of s 4.6 have been satisfied. I agree with this conclusion.

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

- 10 The development is subject to the requirements s 2.48 of State Environmental Planning Policy (Transport and Infrastructure) 2021, relating to electricity transmission and distribution. Relevantly, I accept the parties' advice that Council has given notice to Endeavour Energy and its response has been accommodated in consent conditions.

- 11 The development is also subject to the requirements s 2.119, relating to development with frontage to a classified road. Here I can find that I am satisfied that it is impractical for vehicular access to be provided other than via the classified road (relating to s 2.119(1)). I am also satisfied with respect to the matters at s 2.119(2). The reasoning behind both of these findings are as follows. First is that there is already access to the classified road from the site and it would bring unnecessary adverse impacts to re-arrange access off the other street frontage (ie Woodlands Road). Second is that by correspondence dated 12 September 2022, Transport for NSW have in essence endorsed the proposed access arrangements, subject to certain conditions which have been accommodated in the consent conditions. Third is the detailed commentary responding to relevant traffic management related concerns in the applicant's material (specifically the Statement of Environmental Effects (SEE) and the Traffic Impact Assessment, each of which accompanied the Class 1 application filed with the Court on 13 December 2022).

*State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*

- 12 I accept the advice of the parties that State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP Seniors) applies to this DA under the relevant savings and transitional provisions of State Environmental Planning Policy (Housing) 2021.
- 13 The parties draw my attention to cl 5(3) of SEPP Seniors which provides that “if this Policy is inconsistent with any other environmental planning instrument, made before or after this Policy, this Policy prevails to the extent of the inconsistency.” This becomes relevant when I turn to Liverpool Local Environmental Plan 2008 (LLEP). Other jurisdictional findings with respect to SEPP Seniors are as follows:
- Clause 26 requires that the consent authority be satisfied that the residents will have access to facilities such as shops, banks, retail/commercial facilities, community services and a medical practitioner. The written evidence provided in the SEE (p 41), which also references a “Clause 26 Report” prepared by Judith Stubbs & Associates dated 22 October 2022, clearly demonstrates that residents of the proposed development would have access that complies with cl 26 requirements. I accept the agreed position of the parties that this requirement is satisfied.

- As required by cl 28 I am satisfied that the site is able to be connected and serviced by water and sewer services as an extension of the existing residential services (SEE p 43).
- As required by cl 30, I am satisfied that a site analysis has been completed and taken into account. The commentary in the SEE (p 43) makes this clear, and that required information about the site has been identified. I accept the agreed position of the parties that cl 30 is satisfied.
- Clause 40 outlines development standards which must be complied with to enable a consent authority to have power to approve the development. I accept the documented advice of the parties that all of the development standards are met, with one exception. The exception is with respect to cl 40(4)(c), which provides, relevantly, that “a building located in the rear 25% area of the site must not exceed 1 storey in height”. There is a contravention of this standard which I attend to when considering LLEP and its cl 4.6.
- Clause 48 provides standards that cannot be used to refuse development consent for residential care facilities. Of note here is that under cl 48(b) a DA must not be refused on the basis of density and scale if the density and scale of the buildings when expressed as a floor space ratio is 1:1 or less. In this instance, the parties agree that the FSR is 0.9:1 (as depicted in Drawing DA 06 as filed with the s 34 agreement).

#### *Liverpool Local Environmental Plan 2008*

- 14 The majority of the site is zoned R3 Medium Density Residential under LLEP. The rear, or northern portion of the site (fronting Woodlands Road) is zoned R2 Low Density Residential. I have had regard to the zone objectives applying to each of these zones mindful of cl 2.3(2). Demolition is permissible under cl 2.7.
- 15 Of relevance here is that both building height and floor space ratio controls under LLEP do not apply because of applicable controls in relation to these matters under SEPP Seniors.
- 16 I accept the advice of the parties that there are no further provisions requiring positive jurisdictional findings under LLEP, with the exception of the matter of the contravention of the building height provisions under SEPP Seniors, which relies on cl 4.6 of LLEP.

#### *Contravention of building height provisions under SEPP Seniors*

- 17 The permissive powers at cl 4.6(2) of LLEP apply here, even though the contravention is related to SEPP Seniors (*Ku-ring-gai Council v Pathways Property Groups Pty Ltd* [2018] NSWLEC 73).

- 18 The Court must form two positive opinions of satisfaction under cl 4.6(4)(a) to enliven the permissive power under cl 4.6(2) to grant development consent notwithstanding the contravention. The first opinion is in regard to a written request from the applicant seeking to justify the contravention of the development standard and, specifically, whether it has adequately addressed the two matters required to be demonstrated at cl 4.6(3). The second opinion requires me to make my own finding of satisfaction that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objective of the zone in which the development is proposed to be carried out.
- 19 To open the gate to the application of these permissive powers, mindful of cl 4.6(3) of LLEP, a written request has been received on behalf of the applicant (filed with the parties' s 34 agreement and prepared by Higgins Planning and dated 16 June 2023).

**Particulars of the contravention**

- 20 Section 40(c) of SEPP Seniors provides that a building located in the rear 25% area of the site must not exceed one storey in height. The written request references the architectural plans which showing the area of contravention in the northern area of the site (p 11) and indicates that some 275m<sup>2</sup> of building area would exceed one storey.

**Whether compliance unreasonable or unnecessary in the circumstances of the case**

- 21 According to *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (Wehbe) (at [42]-[51]), establishing that the objective of a development standard has been achieved notwithstanding non-compliance with the standard is one way of demonstrating that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. The written request follows this path.
- 22 While there are no nominated objectives relating to s 40(4) of SEPP Seniors, the written request nominated the following as “underlying objectives” of the standard:

- To ensure that the development is compatible by virtue of its bulk and scale to be consistent with the existing and future character of the rear of the site.
- To not cause unreasonable amenity impacts on adjoining developments at the rear of the site.

- 23 The written request then tested the proposal, and in particular the contravention against these objectives. In my view, the suggested underlying objectives do reasonably capture what might be understood as sought to be achieved behind the numerical standard at s 40(4) of SEPP Seniors. More broadly, with respect to this framing device, I am satisfied with the conceptual approach adopted in the written request.
- 24 The written request argues that the proposal is compatible with the existing character by virtue of bulk and scale because of the character of the existing buildings on the site and, in particular, off the site, but in the environs of the height contravention. Here the written request is pointing to the two storey character of the existing building at 20 Woodlands Road which is in closest proximity to the proposed breach. The written request is suggesting that two storey development forms part of the desired future character. The northernmost wing of the proposed development, which is nearest a single storey neighbour is only single storey. Then the written request turns to the relatively minor scale of the contravention in terms of built upon area (some 275m<sup>2</sup>). These arguments persuade me that the bulk and scale aspects of the development are satisfactory having regard to local character compatibility considerations.
- 25 Also of relevance to both character compatibility, but of more significance to the topic of amenity impacts on adjoining developments to the rear, the written request works through matters such as visual privacy, overshadowing, visual impact and view impact to demonstrate no unreasonable adverse impact. The written request makes clear that amenity impacts would be well managed with the proposal, including having regard to building setback, louvred windows and landscaping along the relevant boundary.
- 26 I am satisfied that the arguments submitted in the written request demonstrate that the objectives of s 40(4)(c) of SEPP Seniors in regard to building height located in the rear 25% area of the site have been achieved. As the objective

of the building height standard is achieved, notwithstanding the contravention, there is no need for strict compliance. No purpose would be serviced by requiring strict compliance with the standard. In turn, the requirements of cl 4.6(3)(a) are met.

**Whether sufficient environmental planning grounds to justify contravening the development standard**

- 27 The written request argues that, in spite of the unusual and irregular shape of the site, with “multiple pinch points” (par 40), the proposal has resulted in two storeys for only a relatively small area within the rear 25% of the site, and that the selected area is in character with the most proximate neighbouring development. Extending the two storey development in this area within the rear 25% of the site makes it practical for other design initiatives to be incorporated, such as larger areas of private open space and landscaping, and higher quality internal areas for future residents. These are environmental planning grounds sufficient to justify the contravention. In turn, the requirements of cl 4.6(3)(b) are met.

**Whether development in the public interest because of consistency with the objectives of the particular standard and the objectives for development within the zone**

- 28 I now turn to the test at cl 4.6(4)(a)(ii) of LLEP, and whether the proposed development would be in the public interest because it is consistent with the objectives of the building height standard and the objectives for development within the relevant zone.
- 29 I agree with and rely on the written request’s demonstration that the proposed development is consistent with the objectives of the relevant SEPP Seniors building height standard as considered above.
- 30 I have earlier indicated that the proposal involves land in both the R2 Low Density Residential zone and the R3 Medium Density Residential zone under LLEP. There is a need to examine both in this instance.
- 31 First, in regard to development within the R2 zone, I note the zone objectives as follows:
- To provide for the housing needs of the community within a low density residential environment.

- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To provide a suitable low scale residential character commensurate with a low dwelling density.
- To ensure that a high level of residential amenity is achieved and maintained.

32 The first and third of these objectives are achieved because the proposal would provide for housing needs of a certain sector of the community (ie seniors and persons with a disability requiring residential care facilities). The setting is low density and low scale with single storey development, generally, in areas in proximity to the R2 zoning (noting the 275m<sup>2</sup> of two storey development referenced above) and with reasonable boundary interface setbacks and landscaping. The second zone objective is also achieved because the proposed residential care aspects of the proposal do necessarily incorporate facilities and services to meet the day to day needs of residents. I am satisfied with the arguments in the written request in regard to the high level of residential amenity proposed.

33 Second, in regard to development within the R3 zone, I note the zone objectives as follows:

- To provide for the housing needs of the community within a medium density residential environment.
- To provide a variety of housing types within a medium density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To provide for a concentration of housing with access to services and facilities.
- To provide for a suitable visual transition between high density residential areas and lower density areas.
- To ensure that a high level of residential amenity is achieved and maintained.

34 The proposal is consistent with the first zone objective because the proposal does provide for a medium density residential environment within that portion of the site zoned R3. The proposal is consistent with the second zone objective because the proposed care accommodation, central to the proposal concept, provides for the sought after variety of housing types. The proposal is

consistent with the third zone objective because the care aspects of the proposal do necessarily incorporate facilities and services to meet the day to day needs of residents. The proposal is consistent with the fourth zone objective because of its direction concentration of residential accommodation in a setting where the care requirements of residents can be met in a concentrated manner. In regard to the fifth zone objective, the proposal does provide for a suitable visual transition between high density residential areas and lower density areas due to the predominance of single storey development near the low density interface and proposed landscaping. As indicated above, I am satisfied with the arguments in the written request in regard to the high level of residential amenity proposed, consistent with the sixth zone objective.

35 Based on my findings above, the proposed development will be in the public interest because it is consistent with the objectives behind s 40(4)(c) of SEPP Seniors and the objectives for development within the relevant zones under LLEP. On this basis, I am satisfied that the requirements of cl 4.6(4)(a)(ii) of LLEP are met in regard to the building height contravention.

36 I am satisfied with the arguments in the written request in regard to the high level of residential amenity proposed.

**Conclusion – contravention of s 40(4)(c) of SEPP Seniors**

37 I do not need the concurrence of the Planning Secretary under cl 4.6(4)(b) of LLEP but note that I have considered the matters in cl 4.6(5) in coming to my conclusions in regard to the contravention and find nothing of significance arises in regard to these matters.

38 With the above findings, the states of satisfaction required by cl 4.6 of LLEP have been reached and there is therefore power to grant development consent to the proposed development, notwithstanding the breach of s 40(4)(c) of SEPP Seniors.

*Other provisions of section 4.15(1) of the Environmental Planning and Assessment Act 1979*

39 Mindful of s 4.15(1)(b), I have given consideration to whether the proposal would have significant environmental impacts on the natural and built environments. My finding is that it would not. Here I also have regard to the

proposed consent conditions, as agreed by the parties. In regard to s 4.15(1)(c), I have had regard to site suitability, again finding in the positive. In regard to s 4.15(1)(d), the parties have drawn my attention to the objecting submissions received and their relationship to amendments adopted in the proposal. In regard to s 4.15(1)(e), I have also given consideration to the public interest and found that the grant of conditional consent would be aligned with it based, essentially, on the above analysis.

## **Conclusion**

40 With the above findings, I am satisfied that the jurisdictional pre-requisites have been met and the parties' decision is one that the Court could have made in the proper exercise of its functions. In turn, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.

41 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, any merit assessment of the issues that were originally in dispute between the parties. The LEC Act also required me to "set out in writing the terms of the decision" (s 34(3)(b)). The final orders have this effect.

42 The Court notes:

- (1) Sydney Western City Planning Panel, as the relevant consent authority, has agreed, under cl 55 of the Environmental Planning and Assessment Regulation 2000, to the Applicant amending development application DA-42/2021 (Amended Application) to rely upon the documents as follows:

Drawing Name	Drawing No.	Page	Revision	Date
Site Plan	DA03		G	14.6.23
Basement Floor Plan	DA04		H	14.6.23
Ground Floor Plan	DA05		H	14.6.23

First Floor Plan	DA06		G	14.6.23
Roof Plan	DA08		G	14.6.23
Elevations	DA09		G	15.6.23
Elevations and Sections	DA10		H	15.6.23
Sections	DA11		G	15.6.23
North Elevation	DA11a		B	15.6.23
Section B	DA11b		B	15.6.23
Perspective View – 1	DA21		F	15.6.23
Perspective View – 2	DA21		F	15.6.23
Perspective View – 3	DA22		F	15.6.23
Perspective View - 4	DA23		F	15.6.23
Perspective View - 5	DA23a		F	15.6.23
Perspective View - 6	DA23b		F	15.6.23
Perspective View - 7	DA23c		F	15.6.23

Perspective View - 8	DA23d		F	15.6.23
Perspective View - 9	DA23e		F	15.6.23
Perspective View - 10	DA23f		D	15.6.23
Perspective View - 11	DA23g		D	15.6.23

#### Landscape plans

Plans	Prepared by	Revision/No.	Date
Landscape Concept Design (Pages 1 -20) and Appendix Plans, Planting Schedule, Landscape Detail and Landscape Specification	LandFX Landscape Architects	D	14.6.23

#### Reports

Report	Prepared by	Revision/No.	Date
Revised Clause 4.6 Variation Request	Higgins Planning		16.6.23
Detailed Site	Consulting	CES211206-	2 May

Investigation	Earth Scientists	WFT-AA	2023
Traffic Cover Letter	The Transport Planning Partnership (TTPP)	19285	24 May 2023
Acoustic Report	ADP Consulting: Engineering	SYD1448	18 May 2023
Food Service Design Documentation	Universal Foodservice Designs	UFD-0659-K-100, 101 and 102, and Foodservice Operational Brief 13 October 2020	22 May 2023

## Orders

43 The Court orders that:

- (1) The written request pursuant to cl 4.6 of Liverpool Local Environmental Plan 2008, dated 16 June 2023 and prepared by Higgins Planning is upheld.
- (2) That the applicant is to pay to the respondent's costs thrown away as a result of the amendment of the application pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979* as agreed or assessed.
- (3) The appeal is upheld.
- (4) Development application DA-42/2021, as amended, for the demolition of existing buildings and structures, construction and operation of a seniors housing development involving a 108 room residential care facility in a three-storey building over a basement, together with associated facilities, access, and landscaping under State Environmental planning Policy (Housing for Seniors or People with a Disability) 2004 at 173 Elizabeth Drive and 18 Woodlands Road,

Liverpool, is determined by the grant of consent, subject to the conditions of consent at Annexure A.

**P Walsh**

**Commissioner of the Court**

Annexure A

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