



Land and Environment Court
New South Wales

Case Name: Raj & Jai Constructions Pty Ltd v Liverpool City Council

Medium Neutral Citation: [2025] NSWLEC 1142

Hearing Date(s): Conciliation conference on 13 February 2025

Date of Orders: 12 March 2025

Decision Date: 12 March 2025

Jurisdiction: Class 1

Before: Washington C

Decision: The Court orders:

- (1) Pursuant to s 38 of the Environmental Planning and Assessment Regulation 2021, the application to amend Development Application No. DA-1099/2022 to rely upon the documents listed at [33], is approved.
- (2) The written request prepared by The Bathla Group made pursuant to section 28 of Appendix 1 of the State Environmental Planning Policy (Precincts—Western Parkland City) 2021, seeking to vary the height development standard in section 18, is upheld.
- (3) The written request prepared by The Bathla Group made pursuant to section 28 of Appendix 1 of the State Environmental Planning Policy (Precincts—Western Parkland City) 2021, seeking to vary the floor space ratio development standard in section 19, is upheld.
- (4) The appeal is upheld.
- (5) Development Application No. DA-1099/2022, as amended, for the demolition of existing structures, and staged construction of a mixed use development comprising 669 apartments (including 81 affordable housing apartments), retail space, basement parking accommodating 1030 car parking spaces, landscaping and associated structures on land legally described as Lot 25 and Lot 26 in Deposited Plan 228850 and known

as 164-170 Croatia Avenue, Edmondson Park, NSW, 2174, is determined by the grant of development consent subject to the conditions at Annexure A.

Catchwords:

DEVELOPMENT APPLICATION – conciliation conference – staged mixed-use development – agreement between the parties – orders

Legislation Cited:

Environmental Planning and Assessment Act 1979, ss 4.14, 4.16, 4.24, 4.46, 8.14, 8.15, 8.7, 10.3
Land and Environment Court Act 1979, s 34
National Parks and Wildlife Act 1974, s 90
Rural Fires Act 1997, s 100B
Water Management Act 2000, ss 90, 91

Environmental Planning and Assessment Regulation, ss 29, 38
Liverpool Local Environmental Plan 2008
State Environmental Planning Policy (Biodiversity and Conservation) 2021, ss 6.65, 11.6, 11.7
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Housing) 2021, Ch 2, Div 1, ss 145, 147, Sch 9
State Environmental Planning Policy (Precincts – Western Parkland City) 2021, Appendix 1, ss 18, 19, 26, 28, 34, 38
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
State Environmental Planning Policy (Sustainable Buildings) 2022
State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.48, 2.99, 2.100, 2.120, 2.122

Texts Cited:

Liverpool Council Community Engagement Strategy and Community Participation Plan 2022
NSW Department of Planning and Environment, Apartment Design Guide (July 2015)
NSW Rural Fire Service, Planning for Bush Fire Protection 2019

Category:

Principal judgment

Parties:

Raj & Jai Constructions Pty Ltd (Applicant)
Liverpool City Council (Respondent)

Representation:	Counsel: J Reid (Applicant) M Harker (Respondent)
	Solicitors: MacPherson Kelley (Applicant) Sparke Helmore Lawyers (Respondent)
File Number(s):	2023/130765
Publication Restriction:	Nil

JUDGMENT

- 1 **COMMISSIONER:** These Class 1 proceedings arise as a result of the deemed refusal, by Liverpool Council (the respondent), of development application DA-1099/2022 which seeks consent for the demolition of existing structures and construction of a mixed-use development at 164 and 170 Croatia Avenue, Edmonson Park (the site).
- 2 The application has been the subject of several amendments, for which leave was granted by the Court. The most recent amendment resulted in the development that is now before the Court comprising 669 apartments (including 81 affordable housing apartments), retail space, basement parking for 1030 vehicles, landscaping and associated structures, over three stages.
- 3 These proceedings were brought to the Court pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act), and were listed for a hearing on 13 February 2025. At the commencement of this hearing, the parties indicated to the Court that they had resolved the issues in contention, and requested the matter be listed for a further conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on the same day.
- 4 At the conciliation conference, the parties reached agreement as to acceptable terms of a decision in the proceedings, noting that the respondent is subject to the control and direction of the Sydney Western Regional Planning Panel for this matter, pursuant to s 8.15(4) of the EPA Act. The terms of the decision involved the Court upholding the appeal and granting development consent to the development application 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 that decision is one 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, which the parties identified and explained, and from this I note the following points.

Jurisdictional matters

- 6 The development application was made with the written consent of the owner of the land, which is legally described as Lots 25 and 26 DP 228850.
- 7 The application was adequately notified in accordance with Liverpool Council's Community Engagement Strategy and Community Participation Plan 2022 from 23 January to 20 February 2023, during which time one submission was received. The amended application was further renotified, and the further amended application again renotified to the entity that made the submission in the original notification period. In response to renotification, one submission was received in two tranches. Based on the amended application, the parties submit, and I accept, that the development as amended adequately addresses the concerns raised in these submissions.
- 8 The site is subject to a concept plan, which was approved in September 2022 under DA-33/2021 and modified on 6 February 2024 (the concept development consent), and remains in force. The site is further subject to a consent for subdivision, approved in August 2023 under DA-458/2022. From the parties' submission and the information within the Statement of Environmental Effects by The Bathla Group dated July 2024, I accept that, pursuant to s 4.24 of the EPA Act, the proposed development is consistent with, and satisfies the relevant conditions of, the concept development consent.

Integrated development

- 9 The development application was lodged as integrated development pursuant to s 4.46 of the EPA Act.
- 10 The site is identified as Bushfire Prone Land on the relevant map under s 10.3 of the EPA Act, with vegetation categories 1 and 3 identified. In response to a

referral, the NSW Rural Fire Service (NSW RFS) recommended conditions for the purpose of s 4.14 of the EPA Act, which have been incorporated into the agreed conditions of consent. I note that, although the NSW RFS response did not contain general terms of approval (GTAs) pursuant to s100B of the *Rural Fires Act 1997*, the Court has the power to determine the appeal regardless pursuant to s 8.14 of the EPA Act. Noting that the development meets the requirements of Planning for Bush Fire Protection 2019 and the requirements of s 4.14(1) of the EPA Act, I accept the parties' submission that the applicant will make the necessary application for a s100B authority when required.

- 11 The application was referred to Heritage NSW pursuant to s 90 of the *National Parks and Wildlife Act 1974*, regarding Aboriginal heritage impacts. Accordingly, Heritage NSW have issued GTAs, and further confirmed their advice remains valid upon the filing of the Class 1 appeal. The GTAs have been incorporated into the agreed conditions of consent where appropriate.
- 12 Due to proximity to Maxwell's Creek, a natural waterway, the development requires controlled activity approval pursuant to ss 90 and 91 of the *Water Management Act 2000* (NSW). Accordingly, the Department of Climate Change, Energy, the Environment and Water (formerly known as WaterNSW) issued GTAs on 28 August 2024, which are included in the agreed conditions of consent.

State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP R&H)

- 13 The SEPP R&H s 4.6 requires the consent authority to consider whether a site is contaminated, and if it is, to be satisfied that the site can be made suitable for the intended use. From the parties' submission, the agreed conditions of consent, the Detailed Site Investigation (DSI) dated 26 October 2020, Additional Site Investigation (ASI) dated 8 December 2022 and a Remediation Action Plan (RAP) dated 24 January 2023, all by EI Australia, I accept that the site can be made suitable for its intended purpose following remediation.

State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP B&C)

- 14 Due to the savings provisions of s 6.65 of the SEPP B&C, the former Ch 11 (Georges River Catchment) that existed prior to 21 November 2022 applies to

the proposed development. Based on the following documents and the parties' submission, I accept that the general principles set out in s 11.6 and the specific planning principles set out in s 11.7 have been considered:

- Civil Engineering/ Stormwater Management Report by Enspire Solutions dated 10 May 2024
- Civil Engineering drawings by Enspire Solutions dated 24 January 2025.
- Aboriginal Cultural Heritage Assessment Report by Apex Archaeology dated 28 February 2022
- DSA, ASI and RAP
- Geotechnical Investigation Report by EI Australia dated 25 September 2020
- Bushfire Threat Assessment by AEP dated 8 August 2024
- Biodiversity Development Assessment Report by AEP dated 21 November 2023
- Combined Demolition/Construction & Operations (On-Going) Waste Management Plan by BRP Consulting dated May 2024

State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP T&I)

- 15 The development is within 5 metres of an exposed overhead electricity power line. Accordingly, pursuant to the requirements of s 2.48 of the SEPP T&I, the application was referred to Endeavour Energy, who provided a response with recommended conditions of consent. These conditions have been incorporated into the agreed conditions of consent.
- 16 The proposed development includes excavation of at least 2 metres below existing ground level, within 25 metres of a rail corridor. Pursuant to the requirements of s 2.99 of the SEPP T&I, the application was referred to Transport for New South Wales (TFNSW), who issued approval subject to recommended conditions of consent. Again, these conditions have been incorporated into the agreed conditions of consent.
- 17 Pursuant to the requirements of ss 2.100 and 2.120 of the SEPP T&I, the LEC Acoustic Assessment by PWNA dated 16 May 2024 makes recommendations, which now form part of the agreed conditions of consent, for building specification and detailing that will ensure the development meets the acoustic requirements of this SEPP.

- 18 The proposed development is identified as ‘traffic generating development’. Accordingly, TFNSW also confirmed their approval pursuant to s 2.122 of the SEPP T&I in the above correspondence, subject to conditions which have been incorporated into the agreed conditions of consent.

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX)

- 19 Due to the savings provisions in the State Environmental Planning Policy (Sustainable Buildings) 2022, the provisions of the SEPP BASIX apply to this development. The application is accompanied by amended BASIX certificates which apply to the development that is now before the Court, in accordance with the provisions of SEPP BASIX.

State Environmental Planning Policy (Housing) 2021 (Housing SEPP)

- 20 Division 1 of Ch 2 of the Housing SEPP as of 13 December 2023 applies to the development, which proposes affordable housing, noting that the application does not rely on the provision for any development bonuses. From the parties’ submission, the agreed conditions of consent and the information contained in the amended application, I accept that the proposed affordable housing component will remain as such for at least 15 years.
- 21 Pursuant to ss 145 and 147(1)(c) of the Housing SEPP, the application was referred to the respondent’s Design Excellence Panel. The parties submit, and I accept that the application as amended addresses the advice received from this panel.
- 22 The building the subject of the application has been designed by a registered architect and is accompanied by a design verification statement which assesses the development against the relevant principles and criteria of Sch 9 of the Housing SEPP and the Apartment Design Guide (ADG), in accordance with s 147 of the Housing SEPP. This also meets the requirements of s 29 of the Environmental Planning and Assessment Regulation.

Local Environmental Planning instruments

- 23 Both the State Environmental Planning Policy (Precincts – Western Parkland City) 2021 (Western Parkland SEPP) and the Liverpool Local Environmental Plan 2008 (LLEP) apply to the site.

- 24 The subject site is zoned part R1 General Residential, part RE1 Public Recreation, part SP2 Infrastructure (local road) under the LLEP and part B4 Mixed Use under Appendix 1 (Edmondson Park South) of the Western Parkland SEPP (Precinct Plan).
- 25 The part of the subject site to which the mixed-use development is proposed is zoned B4 Mixed Use under the Precinct Plan. Mixed use development for the purposes of residential and retail use is permissible with consent in this zone pursuant to the Precinct Plan. The proposed development is also consistent with the objectives of the B4 zone.
- 26 Pursuant to Precinct Plan s 18, a maximum building height of 24m applies to the subject site. The concept plan consent modifies this maximum height to varying degrees for each individual building block, and this proposed development complies with the concept plan. In addition, s 19 of the Precinct Plan establishes a maximum floor space ratio (FSR) for the site of 2:1, which again was varied by the concept plan consent. For completeness, the amended application is supported by two written requests pursuant to s 28 of the Precinct Plan: the first to vary the height of buildings development standard and the second to vary the FSR development standard. The written requests have similar justifications and so I will deal with them concurrently.
- 27 As required under s 28 of the Precinct Plan, both written requests demonstrate that compliance with the development standards is unreasonable and unnecessary because they have been overridden by the concept development consent, which allows for the proposed exceedance of both development standards. There are no objectives to the height of buildings development standard, however the proposal is consistent with the concept development consent, and meets the requirements of the ADG. The FSR development standard has objectives that apply, and the development is generally consistent with these. I, therefore, accept that this test has been met in relation to both height and FSR.
- 28 The written requests further demonstrate that there are sufficient environmental planning grounds to justify the contraventions of the development standards because the proposal is consistent with the concept development consent, and

because the proposal maintains an appropriate transition in built form to adjoining development, generally following the intent of the height and FSR controls in increasing density towards the town centre. Finally, there are no material negative impacts in terms of overshadowing, or acoustic or visual privacy impacts resulting from the non-compliances. I accept that this test has also been met in relation to both height and FSR, and the variation to both development standards is acceptable.

- 29 Pursuant to s 26 of the Precinct Plan, the site is mapped as flood planning area and flood prone land, however this mapping does not extend to the portion of the site on which the development is proposed. Nonetheless, based on the parties' submission and the Maxwell Creek Realignment report by Civile dated February 2023, I accept that the flood planning requirements of s 26 of the Precinct Plan are met with the proposed development.
- 30 From the parties' submission, the Utility Infrastructure Servicing Summary Advice by Enspire Solutions dated 22 May 2024, and the comments issued by both Sydney Water and Endeavour Energy, I accept that infrastructure for the supply of water, electricity or gas, and the disposal and management of sewage, will be made available to the development when required in accordance with s 34 of the Precinct Plan.

Conclusion

- 31 For these reasons, I am satisfied that the parties' decision is one that the Court could have made in the proper exercise of its functions, as required by s 34(3) of the LEC Act.
- 32 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.
- 33 The Court notes the parties have requested that the Court approve, pursuant to s 38 of the Environmental Planning and Assessment Regulation 2021, the applicant amending the development application in accordance with the following documents, as filed with the Court:

Documents	Prepared by	Date
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1	BASIX Certificates	SLR Consulting Pty Ltd	12 February 2025
	Certificate No. 1747541M_02		
	Certificate No. 1747548M_02		
2	BASIX Building Fabric Requirements		
3	Landowner's consent	Raj & Jai 10 Pty Ltd	

34 The Court orders:

- (1) Pursuant to s 38 of the Environmental Planning and Assessment Regulation 2021, the application to amend Development Application No. DA-1099/2022 to rely upon the documents listed at [33], is approved.
- (2) The written request prepared by The Bathla Group made pursuant to section 28 of Appendix 1 of the State Environmental Planning Policy (Precincts—Western Parkland City) 2021, seeking to vary the height development standard in section 18, is upheld.
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- (5) Development Application No. DA-1099/2022, as amended, for the demolition of existing structures, and staged construction of a mixed use development comprising 669 apartments (including 81 affordable housing apartments), retail space, basement parking accommodating 1030 car parking spaces, landscaping and associated structures on land legally described as Lot 25 and Lot 26 in Deposited Plan 228850 and known as 164-170 Croatia Avenue, Edmondson Park, NSW, 2174, is determined by the grant of development consent subject to the conditions at Annexure A.

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E Washington

Commissioner of the Court

Annexure A

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.