



Land and Environment Court New South Wales

Medium Neutral Citation:	Helm No.18 Pty Ltd v North Sydney Council [2022] NSWLEC 1566
Hearing dates:	Conciliation conference held 27 September 2022, final agreement filed 28 September 2022
Date of orders:	18 October 2022
Decision date:	18 October 2022
Jurisdiction:	Class 1
Before:	Pullinger AC
Decision:	The Court orders that: (1) Leave is granted to the Applicant to amend Development Application DA239/21 so as to not include demolition. (2) The Applicant's written request, pursuant to cl 4.6 of the North Sydney Local Environmental Plan 2013 (NSLEP), seeking to vary the development standard for height of buildings as set out at cl 4.3 of the NSLEP, is upheld. (3) The appeal is upheld. (4) Consent is granted to Development Application DA239/21 (as amended) for the excavation (not including demolition) and construction of a part four- part five-storey mixed use development with basement parking, and stratum subdivision at 131-139 Holt Avenue, Cremorne subject to the conditions contained at Annexure A.
Catchwords:	DEVELOPMENT APPLICATION – mixed use development – cl 4.6 written request – height of buildings – agreement between the parties – orders
Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7 Environmental Planning and Assessment Regulation 2000, cll 50, 55 Land and Environment Court Act 1979, s 34 North Sydney Local Environmental Plan 2013, cll 4.3, 4.4A, 4.6, 5.10, 5.21, 6.10, 6.12, 6.12A

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

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

State Environmental Planning Policy (Transport and
Infrastructure) 2021, cl 2.120

State Environmental Planning Policy No 65—Design
Quality of Residential Apartment Development

Cases Cited: Helm No. 18 Pty Ltd v North Sydney Council [2022]
NSWLEC 1406

Texts Cited: Land and Environment Court of New South Wales, COVID-
19 Pandemic Arrangements Policy (February 2022)

Category: Principal judgment

Parties: Helm No.18 Pty Ltd (Applicant)
North Sydney Council (Respondent)

Representation: Counsel:
A Whealy (Solicitor) (Applicant)
P Hudson (Solicitor) (Respondent)

Solicitors:
Mills Oakley (Applicant)
Marsdens Law Group (Respondent)

File Number(s): 2022/131164

Publication restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal of Development Application DA239/21 (the DA) by North Sydney Council (the Respondent). The original DA sought consent for demolition of existing structures, excavation and construction of a part four- part five-storey mixed use development with basement parking, and stratum subdivision at 131-139 Holt Avenue, Cremorne (the site).
- 2 The Court arranged a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 27 September 2022. I presided over the conciliation conference.
- 3 Consistent with the Court's COVID-19 Pandemic Arrangements Policy, published in February 2022, the matter commenced with a site view before resuming by Microsoft Teams.

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During the conciliation conference, the parties reached agreement as to the terms of a decision in these proceedings that would be acceptable to the parties. The agreement involves the Court upholding the appeal and granting development consent to an amended DA, subject to conditions.

5 The history of the DA is relevant to these proceedings and the agreement reached by the parties. A concise history follows:

- (1) The Applicant lodged the DA with the Respondent on 2 August 2021.
- (2) The DA was publicly notified on two occasions, during September 2021 and again in January 2022 (after being amended by the Applicant in December 2021).
- (3) On 11 March 2022, the Respondent gazetted an Interim Heritage Order over a portion of the site at 131 and 133 Holt Avenue.
- (4) On 22 March 2022, the Applicant filed Class 1 proceedings with the Court appealing against the Interim Heritage Order.
- (5) On May 12 2022, the Applicant filed these Class 1 proceedings with the Court appealing against the deemed refusal of the DA.
- (6) On 29 July 2022, Sheridan AC of the Court ordered the Interim Heritage Order be revoked (refer to *Helm No.18 Pty Ltd v North Sydney Council [2022] NSWLEC 1406*).
- (7) As a result of this decision, the Respondent's contentions have been resolved, prompting the parties to settle the matter the subject of this judgment.

6 Of note, the DA has been amended during the conciliation conference so as to no longer seek consent for demolition. Consent for demolition of existing structures on the site has been separately granted and has lawfully commenced on portions of the site.

7 Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision if the parties' decision is a decision that the Court could have made in the proper exercise of its functions. The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the amended DA.

8 There are jurisdictional prerequisites that must be satisfied before this function can be exercised.

9 In that regard, I am satisfied the DA was made with the consent of the owner of the land, evidenced within the Class 1 Application accompanying this matter.

10 The original DA was publicly notified from 10 September to 24 September 2021. Eighty-three submissions were received by the Respondent which were reasonably evenly split between support for, and objection to, the proposal. Issues raised in the objecting submissions included exceedance of the maximum height of building control, demolition of buildings of potential heritage significance, incompatible built form and scale, the introduction of non-residential uses into a primarily residential area, tree loss and amenity impacts more generally.

- 11 The DA was amended on 23 December 2021 and subsequently re-notified between 14 and 28 January 2022. Page 4
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- 12 At the commencement of the conciliation conference, a number of resident objectors addressed the Court raising several of the concerns noted above and further emphasising concerns for traffic congestion, parking and safety, the cumulative impacts of development and renewal evident in the local area, and impacts of construction noise and vibration.
- 13 The parties agree that the DA satisfactorily resolves the matters raised in these public submissions. Accordingly, I am satisfied that s 4.15(1)(d) of the EPA Act has been appropriately addressed.
- 14 The parties agree, and I am satisfied, that the North Sydney Local Environmental Plan 2013 (NSLEP) is the relevant local environmental planning instrument. The site is partly zoned B4 Mixed Use and partly R4 High Density Residential, and the proposed development - characterised as residential apartment development, shop top housing and neighbourhood shop - are each permissible with consent.
- 15 The parties agree, and I am satisfied, that all principal development standards of the NSLEP have been met by the DA, with the exception of cl 4.3, Height of buildings, which establishes two separate heights of building standards, being 16m and 12m for the B4 and R4 zone portions of the site respectively.
- 16 In such an instance, cl 4.6(3) of the NSLEP requires consideration of a written request from the Applicant demonstrating that compliance with this development standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.
- 17 Clause 4.6(4) of the NSLEP requires the consent authority to be satisfied the Applicant's written request has adequately addressed the matters required by cl 4.6(3), and that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard and the objectives for development within the zone in which the development is proposed to be carried out.
- 18 Additionally, cl 4.6(4)(b) of the NSLEP requires the concurrence of the Planning Secretary be obtained, while cl 4.6(5) requires the Planning Secretary to consider whether, in granting this concurrence, the proposed contravention of the development standard raises any matters of significance for State environmental planning, the public benefits of maintaining the standard, and any other matters required to be considered by the Planning Secretary. Given the earlier written advice of the Planning Secretary (in the form of Planning Circular PS 18-003 issued on 21 February 2018), the Court may assume the concurrence of the Planning Secretary in this matter.
- 19 As required by cl 4.6 of the NSLEP, the Applicant has provided a written request (prepared by Ingham Planning and dated February 2022) seeking to vary the height of buildings development standard.

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The parties agree, and I am satisfied that this written request adequately justifies the variance to the height of buildings development standard for the following reasons:

- (1) The DA complies with the 16m height of building standard within the B4 Mixed Use zone, but exceeds the 12m height of building standard within the R4 High Density Residential zone. The development proposes a maximum height of 14.89m above existing ground level, which is 2.89m greater than the standard, or a variation of approximately 24%.
- (2) The objectives of the NSLEP Zone R4 High Density Residential land use zone include providing for the housing needs of the community within a high density residential environment, providing a variety of housing types and ensuring that a reasonably high level of residential amenity is achieved and maintained. I am satisfied the DA meets these objectives.
- (3) The objectives of cl 4.3 of the NSLEP include seeking to encourage an appropriate scale and density of development in accordance with the character of the area, enabling built form that is compatible with the size of the site, and to establishing a transition in scale to protect local amenity. I am satisfied the amended DA meets these objectives.
- (4) The DA was amended (in December 2021) to respond to feedback provided by the Respondent, and in particular the upper-most storey of the building was set back behind the lower levels to minimise visual impacts and the perceived scale of the proposal across the site boundaries.
- (5) Building height associated with the lift overrun and common circulation is centrally located within the site and recedes from view from public vantage points at ground level and at the property boundaries. I am satisfied the variation to the height of building development standard brings with it no material environmental impacts or additional overshadowing.

21 Consequently, I am satisfied the Applicant's cl 4.6 written request adequately justifies the proposed variations to maximum building height.

22 The parties agree, and I am satisfied, that pursuant to cl 4.4A of the NSLEP, Non-residential floor space ratios, a minimum non-residential floor space ratio (FSR) of 0.5:1 applies to the B4 Mixed Use portion of the site. The DA provides a total of 0.55:1 non-residential FSR in the form of a ground floor business premises.

23 The parties agree, and I am satisfied, that pursuant to cl 5.10 of the NSLEP, Heritage conservation, the site is not located in a heritage conservation area and does not comprise any listed heritage items. As noted earlier in this judgment, an Interim Heritage Order for 131 and 133 Holt Avenue has been revoked, and consequently I am satisfied the proposal will not have an impact on any heritage item or heritage conservation area.

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The parties agree, and I am satisfied, that pursuant to cl 5.21 of the NSLEP, Flood planning, the site is not identified within a flood planning area and consequently cl 5.21 is not enlivened by the DA. Page 6

- 25 The parties agree, and I am satisfied, that pursuant to cl 6.10 of the NSLEP, Earthworks, the Applicant has provided a Geotechnical Investigation prepared by EI Australia. This report provides a number of recommendations to avoid, minimise and mitigate the impacts of the development. These recommendations are incorporated within the agreed conditions of consent.
- 26 The parties agree, and I am satisfied, that pursuant to cl 6.12 of the NSLEP, Residential flat buildings, the DA will not result in a single dwelling house, dual occupancy or semi-detached dwelling being left isolated on adjoining land.
- 27 The parties agree, and I am satisfied, that pursuant to cl 6.12A of the NSLEP, Residential flat buildings in Zone B4 Mixed Use, the DA is for mixed uses, of which no part of the ground floor of the building addressing Holt Avenue within the B4 zone is used for residential accommodation.
- 28 The parties agree, and I am satisfied, that State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience and Hazards) is an additional relevant environmental planning instrument. The Applicant has provided a Preliminary Waste Clarification Assessment, prepared by JK Environments and dated 5 February 2021. This report recommends measures to minimise the potential for demolition works to impact the quality of fill and soil associated with the development. These recommendations are reflected within the agreed conditions of consent. Accordingly, I am satisfied the DA addresses the matters outlined in s 4.6 of SEPP Resilience and Hazards.
- 29 The parties agree, and I am satisfied, that the DA is subject to the provisions of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX). A BASIX certificate (No. 1189674M_02) has been submitted with the DA. Agreed conditions of consent are to be imposed to ensure compliance with the BASIX certificate.
- 30 The parties agree, and I am satisfied, that the DA is subject to the provisions of State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65). Pursuant to the provisions of the Environmental Planning and Assessment Regulation 2021 (EPA Reg), the Applicant's architect, Brick Architects and its nominated architect Mr Marc Golombick (NSW registered architect 9951), has prepared a Design Verification Statement, dated 2 August 2021, fulfilling the requirements of cl 50(1AB) of the EPA Reg, and confirming that the DA achieves the Design Quality Principles set out in SEPP 65.
- 31 The parties agree, and I am satisfied, that State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP Infrastructure) is an additional relevant environmental planning instrument. The site is located in close proximity to Military

Road which is a classified state road with an annual average daily traffic greater than 20,000 vehicles. The Applicant has provided an Acoustic Assessment, prepared by Renzo Tonin & Associates, which sets out appropriate measures to ensure noise levels will meet the requirements of cl 2.120 of SEPP Infrastructure. Agreed conditions of consent are imposed to ensure compliance with this report's recommendations.

32 Having considered each of the preceding jurisdictional requirements and having formed the necessary view required by s 34(3) of the LEC Act, I find it is appropriate to make the orders agreed to by the parties and now dispose of the matter.

33 The Court notes that:

- (1) Pursuant to cl 55(1) of the Environmental Planning and Assessment Regulation 2000, the Applicant has amended the DA with the agreement of the Respondent.
- (2) The amended DA documents were uploaded to the NSW Planning Portal on 19 and 27 September 2022.
- (3) The Applicant has filed the amended DA with the Court on 27 September 2022.

Orders

34 The Court orders that:

- (1) Leave is granted to the Applicant to amend Development Application DA239/21 so as to not include demolition.
- (2) The Applicant's written request, pursuant to cl 4.6 of the North Sydney Local Environmental Plan 2013 (NSLEP), seeking to vary the development standard for height of buildings as set out at cl 4.3 of the NSLEP, is upheld.
- (3) The appeal is upheld.
- (4) Consent is granted to Development Application DA239/21 (as amended) for the excavation (not including demolition) and construction of a part four- part five-storey mixed use development with basement parking, and stratum subdivision at 131-139 Holt Avenue, Cremorne subject to the conditions contained at Annexure A.

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M Pullinger

Acting Commissioner of the Court

Annexure A

Architectural Plans

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.

Decision last updated: 18 October 2022