

AUSTRALIA / JUDGMENT

Folder v Mosman Council

[2026] NSWLEC 1645**COURT**

Land and Environment Court

DECIDED

29 September 2026

BEFORE

O'Neill C

CASE / FILE NUMBER

2026/189967

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Land and Environment Court

New South Wales

Medium Neutral Citation: Folder v Mosman Council [2026] NSWLEC 1645**Hearing dates:** 9 and 10 September 2026**Date of orders:** 29 September 2026**Decision date:** 29 September 2026**Jurisdiction:** Class 1**Before:** O'Neill C**Decision:**

The orders of the Court are:

(1) The appeal is upheld.
(2) Development Application No 8.2025.297.1 for alterations and additions to the existing dwelling, at 46 Parriwi Road, Mosman, is determined by the grant of consent, subject to the conditions of consent at Annexure A.

Catchwords: DEVELOPMENT APPLICATION – alterations and additions to a local heritage item – conciliation conference – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979 (NSW), ss 4.16, 8.7
Land and Environment Court Act 1979 (NSW), ss 34, 34AA
Environmental Planning and Assessment Regulation 2021 (NSW), s 38
Mosman Local Environmental Plan 2012, Sch 5, cll 4.3, 4.3A, 4.6, 5.10
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6

Cases Cited: Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118
Joseph v Spencer (2026) 266 LGERA 133; [2026] NSWCA 46

Category: Principal judgment

Parties:	Samuel James Folder (Applicant) Mosman Council (Respondent)
Representation:	
Counsel:	S Griffiths (Solicitor) (Applicant) J Ede (Solicitor) (Respondent)
Solicitors:	Bartier Perry Lawyers (Applicant) Pikes & Verekers Lawyers (Respondent)
File Number(s):	2026/189967
Publication restriction:	Nil

JUDGMENT

COMMISSIONER: This is an appeal pursuant to the provisions of s 8.7(1) of the Environmental Planning and Assessment Act 1979 (NSW) (EPA Act) against the refusal of Development Application No 8.2025.297.1 for alterations and additions to the existing dwelling (the proposal), at 46 Parriwi Road, Mosman (Lot 3 in DP 17697) (the site), by Mosman Council (the Council). The Court arranged a conciliation conference under s 34AA of the Land and Environment Court Act 1979 (NSW) (LEC Act) between the parties, which was held on 9 and 10 September 2026. I presided over the conciliation conference. At the conciliation conference, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision if the parties' decision is a decision that the Court could have made in the proper exercise of its functions. The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application. Amended application The Council, as the consent authority, consented to the amendment of the application pursuant to s 38(1) of the Environmental Planning and Assessment Regulation 2021 (NSW). The plans and documents comprising the amended application are as follows:

1. Architectural plans prepared by Hampton Architecture:
 - a) Drawing number 01 (Issue E) – Cover Page / Site Plan, dated September 2026
 - b) Drawing number 02 (Issue D) – Proposed Roof Plan, dated September 2026
 - c) Drawing number 03 (Issue B) – Proposed Garage Plan, dated August 2026
 - d) Drawing number 04 (Issue B) – Proposed Lower Ground Floor Plan, dated August 2026
 - e) Drawing number 05 (Issue D) – Ground Floor Plan, dated September 2026
 - f) Drawing number 06 (Issue E) – Proposed First Floor Plan, dated September 2026
 - g) Drawing number 07 (Issue E) – Proposed Elevations East & West, dated September 2026
 - h) Drawing number 08 (Issue E) – Proposed Elevations North & South, dated September 2026

- i) Drawing number 09 (Issue E) – Proposed Sections A & B, dated September 2026
- j) Drawing number 10 (Issue C) – Proposed Sections A & B, dated September 2026
- k) Drawing number 11 (Issue B) – Materials and Finishes, dated September 2026
2. Clause 4.6 Variation Statement (v9) – Height of Building Development Standard prepared by City Planning Works, dated 14 September 2026
3. Clause 4.6 Variation Statement (v7) – Height of Building (Additional Provisions) Development Standard prepared by City Planning Works, dated 9 September 2026
4. BASIX Certificate number A1861517_02 prepared by Hampton Architecture, dated 11 September 2026
The Council is satisfied that all contentions raised in the Statement of Facts and Contentions filed 2 June 2026 are resolved by the amended application and the conditions of consent at Annexure A. I therefore need only consider a provision in an environmental planning instrument that constitutes a jurisdictional constraint on the granting of consent to the application (*Joseph v Spencer* (2026) 266 LGERA 133; [2026] NSWCA 46 at [140]). Pre-conditions to the grant of consent I accept the Council's assessment that the site is suitable for the development, having been historically used for a residential purpose, and that the matters under s 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021 have been addressed. The site is zoned R3 Medium Density Residential pursuant to the Mosman Local Environmental Plan 2012 (LEP 2012). The objectives of the R3 zone, to which regard must be had, are:
 - 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 housing that is compatible with the desired future character of the area in terms of bulk, height and scale.
 - To encourage residential development that has regard to local amenity and, in particular, public and private views. The site is a local heritage item, "House and garden" (Sch 5 to LEP 2012, Item No 202). Pursuant to cl 5.10(4) of LEP 2012, the consent authority must consider the effect of the proposal on the heritage significance of the item, prior to granting consent under cl 5.10. I accept the agreement of the parties' heritage experts that the amended application and the agreed conditions of consent at Annexure A collectively address the issues raised by the Council's heritage contention. Contravention of the height of buildings development standard The proposal exceeds the height of buildings development standard for the site of 8.5m under cl 4.3 with a maximum height of 11.2m to the uppermost ridge of the existing main roof form. The maximum height of the additions to the roof are 0.84m below the uppermost ridge of the existing main roof form. The applicant provided a written

request to vary the development standard prepared by City Planning Works and the latest revision of the request is dated 14 September 2026. Clause 4.6(3) of LEP 2012 establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent (*Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 at [13]). As the Council has agreed to the terms of the decision, it can be inferred that the Council has formed two positive opinions of satisfaction under cl 4.6(3) of LEP 2012, that:

- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and
- (b) there are sufficient environmental planning grounds to justify the contravention of the development standard. Contravention of the maximum wall height development standard
The amended proposal exceeds the wall height development standard of 7.2m under subcl 4.3A(4) of LEP 2012, with a maximum wall height of 7.388m. The applicant provided a written request to vary the development standard prepared by City Planning Works, and the latest revision of the request is dated 9 September 2026. As the Council has agreed to the terms of the decision, it can be inferred that the Council has formed two positive opinions of satisfaction under cl 4.6(3) of LEP 2012, that:
 - (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and
 - (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

Conclusion

I have considered the submissions made by the Council in the Jurisdictional Statement filed with the Court on 18 September 2026 and I am satisfied on the basis of the evidence before me that the agreement of the parties is a decision that the Court could have made in the proper exercise of its functions.

Orders

The orders of the Court are: The appeal is upheld. Development Application No 8.2025.297.1 for alterations and additions to the existing dwelling, at 46 Parriwi Road, Mosman, is determined by the grant of consent, subject to the conditions of consent at Annexure A. S O'Neill Commissioner of the Court

Annexure A (410 KB, 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. Decision last updated: 29 September 2026

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Prepared on 23 October 2026 · Esheria