AUSTRALIA / JUDGMENT

Upscale Developments Pty Ltd v Woollahra Municipal Council

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Land and Environment Court New South Wales Medium Neutral Citation: Upscale Developments Pty Ltd v Woollahra Municipal Council [2026] NSWLEC 1634 Hearing dates: Conciliation conference held on 11 September 2026 Date of orders: 25 September 2026 Decision date: 25 September 2026 Jurisdiction: Class 1 Before: Espinosa C Decision: The Court orders:

(1) In accordance with s 8.15(3) of the Environmental Planning and Assessment Act 1979 (NSW), the Applicant is to pay the Respondent's costs thrown away as a result of the amendment in the amount of $10,000.00 within 14 days of these orders.

(2) The appeal is upheld.

(3) Development Application DA 452/2025/1 (DA) for demolition of the existing dwellings and the construction of a new residential flat building including 17 units of which 5 are affordable housing units at 574-576 Old South Head Road, Rose Bay NSW 2029 is determined by the grant of consent subject to conditions contained in Annexure 'A'. Catchwords: DEVELOPMENT APPEAL — residential flat building — conciliation conference — agreement between the parties — orders Legislation Cited: Environmental Planning and Assessment Act 1979 (NSW), ss 4.16, 8.7, 8.15 Land and Environment Court Act 1979 (NSW), s 34 Environmental Planning and Assessment Regulation 2021 (NSW), s 38 State Environmental Planning Policy (Biodiversity and Conservation) 2021, Pt 6.2, Ch 6, Sch 6, ss 6.6, 6.7, 6.8, 6.9, 6.28 State Environmental Planning Policy (Housing) 2021, Chs 2, 4, 6, ss 15C, 16, 21, 144, 145, 176 State Environmental Planning Policy (Resilience and Hazards) 2021, Ch 2, ss 2.10, 2.11, 4.6 State Environmental Planning Policy (Sustainable Buildings) 2022 State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.118, 2.119, 2.120 Woollahra Local Environmental Plan 2014, cll 2.7, 4.1A, 4.3, 4.4, 4.6, 5.10, 5.21, 6.1 Texts Cited: Woollahra Community Participation Plan 2023 Category: Principal judgment Parties: Upscale Developments Pty Ltd (Applicant) Woollahra Municipal Council (Respondent) Representation: Counsel: A Boskovitz (Solicitor) (Applicant) J Hewitt (Solicitor) (Respondent) Solicitors: Boskovitz Lawyers (Applicant) HWLE Lawyers (Respondent) File Number(s): 2026/58196 Publication restriction: No

Judgment

COMMISSIONER: This is a Class 1 Development Appeal pursuant to s 8.7 of the Environmental Planning and Assessment Act 1979 (NSW) (EPA Act) being an appeal against the refusal of Development Application DA 452/2025/1 (DA) for demolition of the existing dwelling houses and construction of a new residential flat building containing a total of 17 units of which 5 are affordable housing units (Proposed Development) at 574-576 Old South Head Road, Rose Bay and is legally described as Lot C in DP 165300 and Lot D in DP 165583 (the Site). The Court arranged a conciliation conference under s 34(1) of the Land and Environment Court Act 1979 (NSW) (LEC Act) between the parties, which was held on 11 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. This decision involved the Court upholding the appeal and granting development consent to the DA subject to conditions. 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. In making the orders to give effect to the agreement between the parties, I was not required to, and have not, made any merit assessment of the issues that were originally in dispute between the parties. The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the DA. There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties identified the jurisdictional prerequisites of relevance in these proceedings to be various terms of the Woollahra Local Environmental Plan 2014 (WLEP), the State Environmental Planning Policy (Housing) 2021 (Housing SEPP), State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport and Infrastructure SEPP) relating to development on a classified road, the State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP) relating to coastal management and contamination, and the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity and Conservation SEPP) relating to water quality in a regulated catchment. The parties explained how the jurisdictional prerequisites have been satisfied in a jurisdictional note provided to the court. The DA was notified and advertised in accordance with the requirements of Ch 6 of the Woollahra Community Participation Plan 2023 from 14 January 2026 to 13 February 2026. There were 49 submissions received raising issued issues summarised at par 14 of the Statement of Facts and Contentions (SOFAC) and par 5.2. On 2 July 2026, an earlier s 34 conciliation conference took place between the parties, and they heard from a number of residents who raised issues summarised in the SOFAC filed by the Respondent on 7 April 2026 including bulk and scale, overshadowing, loss of privacy, traffic, flooding, geotechnical matters and context and character. The parties explain that the issues raised by residents have been considered by the parties because the Applicant's amendments to the Proposed Development have reduced the bulk and scale of the development including the basement and the aboveground built form and have resulted in a reduction in impacts including privacy impacts, overshadowing as well as reduced excavation. The Owners have provided their consent: Class 1 Application, Tab 2. The Site is zoned R3 – Medium Density Residential under the WLEP. Development for the purposes of residential

flat buildings is permissible with consent in the R3 zone, and demolition may be carried out with development consent under cl 2.7 of the WLEP. In respect of the terms of Ch 2 Affordable Housing in the Housing SEPP, and pursuant to s 15C of the Housing SEPP, the relevant Division applies because development for the purpose of residential flat buildings is permissible with consent in the R3 zone pursuant to the WLEP, at least 10% of the Proposed Development is proposed to be affordable housing and the Site is within an area considered by s 15C(1)(c) of the Housing SEPP. Chapter 4 of the Housing SEPP also applies to the Proposed Development because it seeks consent for a residential flat building pursuant to s 144(2)(a) of the Housing SEPP. Woollahra Municipal Council does not have a design review panel: s 145(3)(a), Housing SEPP. The Site is within the low and mid rise (LMR) outer area pursuant to Chapter 6 of the Housing SEPP. Clause 4.1A of the WLEP prescribes a minimum lot size development standard of 700 m2. The Provisions of Ch 6 of the Housing SEPP do not require a minimum Lot size but Ch 2 does for infill affordable housing. In any event, the Site area is 1081.7m2 which would otherwise have met all requisite minimum lot size requirements. Clause 4.3 of the WLEP prescribes a maximum height of building (HOB) development standard for the Site, however pursuant to the Housing SEPP the applicable HOB development standard is 17.5m. The Proposed Development relies on the provisions of s 16(3) of the Housing SEPP that permits an additional 30% height on the provision of affordable housing. On this basis the maximum permissible HOB is 22.75m. The Proposed Development complies with the maximum permissible HOB with a maximum HOB of 22.18m. Clause 4.4 of the WLEP prescribes the maximum floor space ratio (FSR) development standard of 1:1 for the Site however, the Proposed Development relies on the provisions of s 16 of the Housing SEPP that permits an FSR of 1.5:1 as well as an additional 30% GFA on the provision of affordable housing which ultimately permits an FSR of 1.95:1. The gross floor area (GFA) of the Proposed Development is 2,109.00m2 on a Site which is under the permissible GFA of 2109.30m2. The GFA Calculations are shown in architectural drawing DA9002. The Housing SEPP would then require at least 316.35m2 to be allocated as affordable housing. The Proposed Development provides a compliant 338.87m2 by the allocation of the following units to affordable housing: 1.01, 2.01, 4.01, 5.01 and 6.01. Neither the Site nor the existing building on the Site is a heritage item and the Site is not within a heritage conservation area: cl 5.10, WLEP. The Site is identified as being within an area identified in the Flood Planning Area on the Flood Planning Map in the WLEP. To satisfy the terms of cl 5.21 of the WLEP regarding Flood Planning, the Applicant relies on a Flood Report and the parties note that the amendments to the Proposed Development have not changed the floor levels. The subject site is within a Class 5 area as specified in the Acid Sulfate Soils Map pursuant to cl 6.1 of the WLEP. However, the Proposed Development is not likely to lower the water table below 1.0m AHD on any land within 500m of a Class 1, 2, 3 and 4 land classifications. Accordingly, preliminary assessment is not required and there is unlikely to be any acid sulfate affectation. The Council considers that the Proposed Development contravenes the terms of s 176(2) of the Housing SEPP and has required from the Applicant a cl 4.6 Written Request pursuant to the WLEP to justify that contravention. The Applicant has provided a cl 4.6 Written Request clearly labelled “Prepared on a Precautionary Basis” in relation to the number of storeys of the Proposed Development and the Council considers the cl 4.6 Written Request as adequate. In respect to the consideration of contamination of the Site

pursuant to s 4.6(4) of the State Environmental Planning Policy (Resilience and Hazards) 2021, the Site: is not within an investigation area; is currently used as residential premises and not for any use listed in Table 1 of the Contaminated Land Planning Guidelines; and has been existing for some time and the parties agree that the long-term pre-existing use of the site has been for residential purposes. The Site is located wholly outside of the Coastal Environment Area (s 2.10, Resilience and Hazards SEPP) and outside the Coastal Use Area (s 2.11, Resilience and Hazards SEPP). On this basis, the parties agree that the Court can be satisfied that no further consideration is required under Ch 2 of the Resilience and Hazards SEPP 2021. The Site is located within the Sydney Harbour Catchment in accordance with the maps associated with the Biodiversity and Conservation SEPP, but it is located outside the Foreshores and Waterways Area identified in the relevant map: s 6.28, BC SEPP. Accordingly, Ch 6 of the BC SEPP requires consideration of the impacts of development on land located within the Sydney Harbour Catchment, which is a "regulated catchment" as defined in Sch 6 – Dictionary to Ch 6 of the BC SEPP. Part 6.2 of the Biodiversity and Conservation SEPP provides jurisdictional prerequisites to be satisfied prior to grant of consent to development on land in a regulated catchment relating to: water quality and quantity: s 6.6; aquatic ecology: s 6.7; flooding: s 6.8; and recreation and public access s 6.9. The parties agree that the Court can be satisfied that: the Stormwater Management Plans listed at [36] below, ensure that: the effect on the quality of water entering a natural waterbody will be neutral or beneficial and, in all likelihood, beneficial noting the existing lack of filtration and other current day mechanisms on the Site; and the impact on water flow in a natural waterbody will be minimised (s. 6.6(2), Biodiversity and Conservation SEPP). the Proposed Development: keeps to a minimum any direct, indirect or cumulative adverse impact on terrestrial, aquatic or migratory animals or vegetation; will not have a direct, indirect or cumulative adverse impact on aquatic reserves; minimises the erosion of land abutting a natural waterbody or the sedimentation of a natural waterbody; and minimises any adverse impact on wetlands (s. 6.7, Biodiversity and Conservation SEPP). the Proposed Development is very unlikely to have any impact on periodic flooding that benefits wetlands and other riverine ecosystems (s. 6.8, Biodiversity and Conservation SEPP); and the Proposed Development does not affect public access to and from natural waterbodies (s. 6.9, Biodiversity and Conservation SEPP); An amended BASIX Certificate has been prepared in accordance with the provisions of the State Environmental Planning Policy (Sustainable Buildings) 2022. Conditions of consent numbered D.3, G.14 and H2 require compliance with the issued BASIX Certificate. The Proposed Development has a frontage onto Old South Head Road being a classified road. Although s 2.118 of the Transport and Infrastructure SEPP was repealed on 1 July 2026 and no longer applies to the Proposed Development, the Respondent had referred the DA for concurrence to Transport for NSW who issued concurrence subject to standard general terms of approval which are included in the conditions of consent at Annexure A. The consent authority must not grant consent to development on land that has a frontage to a classified road unless it is satisfied that the Proposed Development will not adversely affect the safety, efficiency and ongoing operation of the classified road; and includes measures to ameliorate potential traffic noise or vehicle emissions within the site of the development arising from the adjacent classified road: s 2.119, Transport and Infrastructure SEPP. In this regard the Respondent's traffic engineer raised no concerns with

respect to the Proposed Development. The parties note that the Proposed Development reduces vehicular access from Old South Head Road from two existing driveways to a single driveway. The angle of the driveway of the Proposed Development has changed to be perpendicular to the road, and the single driveway as vehicular access to the Site will not adversely affect the safety, efficiency and ongoing operation of Old South Head Road. The Applicant has prepared the Acoustic Report addressing the jurisdictional prerequisites raised in s 2.120 of the Transport and Infrastructure SEPP and have made recommendations to ensure satisfaction of the requirements. The Conditions of Consent at Annexure A impose appropriate conditions to enforce the implementation of the recommendations in the Acoustic Report. There is a condition of consent requiring the affordable housing within the Proposed Development to be used as such for 15 years, as set out in the Housing Letter. A Housing Letter has been provided to satisfy this provision: s 21(1)(b), Housing SEPP. 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. 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. Notations: The Court notes that the Respondent, Woollahra Municipal Council, as the relevant consent authority, has approved under s 38 of the Environmental Planning and Assessment Regulation 2021 (NSW), to the Applicant amending Development Application DA 452/2025/1 to rely on the documents listed below: Reference Description Author Date DA 1005 J Architectural Drawings (Revision J) Mark Shapiro Architects 4/08/2026 DA 1006 J DA 2001 J DA 2002 J DA 2003 J DA 2004 J DA 2005 J DA 2006 J DA 2007 J DA 2008 J DA 2009 J DA 2010 J DA 2011 J DA 2300 J DA 2301 J DA 2302 J DA 2303 J DA 2400 J DA 2401 J DA 2402 J DA 2403 J DA 2404 J DA 6301 J DA 6302 J Rev B Design Verification Statement Mark Shapiro Architects July 2026 1823394M_02 BASIX Certificate CE Sustainable Design 30/07/2026 #HR-5FJC4D-02 NatHERS Certificate EBS Consultants 30/07/2026 Page 1 Landscape Plans (Issue B) Tranquility 1/08/2026 Page 2 Page 3 Page 4 Page 5 Page 6 Page 7 D00 Rev. B Stormwater Management Plans (Project No. 250529) SMART Structures 30/07/2026 D01 Rev. B D01A Rev. A D02 Rev B D07 Rev. B D08 Rev. B D15 Rev. B D16 Rev. B D20 Rev A BA251041 DA Stage Acoustic Assessment Blackett Acoustics November 2025 25761 State Environmental Planning Policy (Housing) 2021 cl4.6 Request for Exception to Development Standard - Number of Storeys GSA Planning 10 August 2026 Letter from Home Ground Real Estate Sydney to Update Developments HomeGround Real Estate 27 November 2025

Orders:

The Court orders: In accordance with s 8.15(3) of the Environmental Planning and Assessment Act 1979 (NSW), the Applicant is to pay the Respondent's costs thrown away as a result of the amendment in the amount of $10,000.00 within 14 days of these orders. The appeal is upheld. Development Application DA 452/2025/1 (DA) for demolition of the existing dwellings and the construction of a new residential flat building including 17 units of which 5 are affordable housing units at 574-576 Old South Head Road, Rose Bay NSW 2029 is determined by the grant of consent subject to conditions contained in Annexure 'A'. E Espinosa Commissioner of the Court

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Annexure A.916 KB.pdf Architectural Plans.14.3 MB.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: 25 September 2026

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