



Land and Environment Court  
New South Wales

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Case Name: Urbex 117 Pty Ltd v Tweed Shire Council

Medium Neutral Citation: [2023] NSWLEC 1265

Hearing Date(s): Conciliation conference on 21 February and 31 March 2023

Date of Orders: 1 June 2023

Decision Date: 1 June 2023

Jurisdiction: Class 1

Before: Dickson C

Decision: The Court orders:  
(1) The appeal is upheld.  
(2) The Applicant is to pay those costs of the Respondent thrown away as a result of the amendment of the application for development consent as agreed or assessed in accordance with s 8.15(3) of the Environmental Planning and Assessment Act 1979.  
(3) Development consent is granted to development application DA 21/0517, as amended, for the demolition of existing structures on site, construction of a four-storey residential flat building with basement car parking, swimming pool and related landscaping subject to the conditions set out in Annexure A.

Catchwords: DEVELOPMENT APPEAL – demolition and residential flat development – conciliation conference – amended plans – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.14, 4.15, 4.16, 8.15, Environmental Planning and Assessment Regulation 2021, ss 29, 38

Land and Environment Court Act 1979, ss 34  
State Environmental Planning Policy No 65—Design  
Quality of Residential Apartment Development 2002,  
cl 30, Sch 1  
State Environmental Planning Policy No 55 –  
Remediation of Land 1998, cl 7  
State Environmental Planning Policy (Resilience and  
Hazards) 2021, ss 2.10, 2.11, 2.12, 2.13, 4.6,  
State Environmental Planning Policy (Transport and  
Infrastructure) 2021, s 2.119  
Tweed Local Environmental Plan 2014, cl 4.15, 5.21,  
7.6, 7.8, 7.10

Category: Principal judgment

Parties: Urbex 117 Pty Ltd (Applicant)  
Tweed Shire Council (Respondent)

Representation: Counsel:  
S Gadiel (Solicitor) (Applicant)  
D Loether( Solicitor) (Respondent)

Solicitors:  
Mills Oakley (Applicant)  
Bartier Perry (Respondent)

File Number(s): 2022/274881

Publication Restriction: No

## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) by the Applicant against the actual refusal by Tweed Shire Council of its development application DA-21/0517 (DA). The DA seeks consent for demolition of existing structures and construction of a four-storey residential flat building with basement car parking, swimming pool and landscape. The subject site is Lot 26 DP 1253093 known as 2-6 Tweed Coast Road, Cabarita Beach.
- 2 In accordance with the Court's usual practice, the matter was referred to a Court arranged conciliation conference between the parties under s 34 of the *Land and Environment Court Act 1979* (LEC Act). The conciliation

conference was held on 21 February and 31 March 2023. During the conciliation process, the parties agreed amendments to the proposed development. The agreed orders provide leave to the Applicant to rely on this amended material in their DA.

- 3 Following the conciliation, an agreement under s 34(3) of the LEC Act, was reached between the parties as to the terms of a decision in the proceedings that would be acceptable to them. The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the DA subject to conditions of consent.
- 4 As the presiding Commissioner, I am satisfied that the decision is one that the Court can make in the proper exercise of its functions (this being the test applied by s 34(3) of the LEC Act). I have formed this state of satisfaction for the following reasons:
  - (1) Landowners consent was provided by the owner of the land at the time of the lodgement of the DA.
  - (2) Consistent with the requirements of s 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP RH), I have given consideration to the potential contamination of the land.
  - (3) Pursuant to cl 4.6(4) of SEPP RH the land is not within an investigation area; development for a purpose referred to in Table 1 of the Contaminated Land Planning Guidelines is not known to have been carried out on the land and historic zoning controls for the land did not make lawful the carrying out of activities nominated in Table 1. The Statement of Environmental Effects (SEE) supporting the DA notes that as part of a previous development application a preliminary contaminated land investigation was completed which confirmed that the site is not impacted by any contaminants nor was there any evidence of contaminating activities having occurred on the site.
  - (4) BASIX Consistent with cl 6 (1) (a) of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004, a BASIX certificate has been submitted for the amended DA.
  - (5) Chapter 2 of SEPP RH applies to the land which is mapped as within the coastal environmental area. Pursuant to s 2.10 (2) in granting consent I am satisfied on the basis of the statements in the SEE, and the agreement of the parties, that the development is designed, sited and will be managed avoid an adverse impact on the matters listed at s 2.10(1) of SEPP RH.
  - (6) Pursuant to SEPP RH, the site is also mapped within the coastal use area. Pursuant to s 2.11 (1) (b) in granting consent I am satisfied on the

basis of the statements in the SEE, and the agreement of the parties that the development is designed, sited and will be managed avoid an adverse impact on the matters listed at s 2.11 (1) (a) of SEPP RH. Further, in determining the application I have taken into account the surrounding coastal and built environment, and the bulk, scale and size of the proposed development.

- (7) Pursuant to SEPP RH, the site is also within the coastal zone. I am satisfied on the basis of the statements in the SEE, and the agreement of the parties that the proposed development does not lead to increased risk of coastal hazards on the subject land or surrounding land satisfying s 2.12. Pursuant to s 2.13 there is no certified coastal management program which applies to the land.
- (8) The site is mapped as bushfire prone land. The DA was referred to the NSW Rural Fire Service for consultation pursuant to s 4.14 of the EPA Act. The NSW Rural Fire Service has provided proposed conditions of approval which are included in the annexed conditions
- (9) The development is required to comply with the provisions of State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development 2002 (SEPP 65) and the provisions of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation). The Applicant has filed a Design Verification Statement that meets the requirements of s 29(2) of the EPA Regulation (Registered architect number: 5364). As required by cl 30(2) of SEPP 65, I am satisfied that the proposed development demonstrates adequate regard has been given to the design quality principles at Sch 1 of the SEPP 65, and to the objectives specified in the Apartment Design Guide.
- (10) The site has frontage to a classified road – Tweed Coast Road, as such s 2.119 of State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP TR) applies. The development application is accompanied by a Traffic Impact Assessment, addressing subss 2(a) and (b), and a Noise Impact assessment addressing s 2(c). I am satisfied that:
  - (a) the proposed development will provide vehicular access to the site by a road other than a classified road;
  - (b) will not adversely affect the safety, efficiency and ongoing operation of the classified road; and
  - (c) is appropriately located and designed, and includes measures to ameliorate potential traffic noise or vehicle emissions within the site of the development arising from the adjacent classified road.
- (11) Tweed Local Environmental Plan 2014 (LEP 2014) applies to the land and zones it 'R3 Medium Density Residential'. Development for the purpose of a residential flat building is permitted with consent in the zone.

- (12) Pursuant to cl 5.21 of LEP 2014 - Flood Planning, the Applicant prepared an assessment which confirms that the site is not within the flood planning area and that the provision does not apply.
  - (13) As the development is proposed residential development, cl 7.6 - Stormwater Management in LEP 2014 applies. I accept the agreement of the parties and the comments in the SEE that pursuant to subcl (3) I can be satisfied that the proposed development:
    - (a) Is designed to maximise the use of water permeable surfaces on the land having regard to the soil characteristics affecting on-site infiltration of water;
    - (b) It is not practicable for on-site water retention for use as an alternative supply to mains water, ground water or river water; and
    - (c) Avoids any significant adverse impacts of stormwater run off on adjoining properties, native bushland and receiving waters, or if that impact cannot be reasonably avoided, the development minimises and mitigates the impact.
  - (14) Pursuant to cl 7.8(2) - Airspace Operations of LEP 2014, the proposed development does not penetrate the Obstacle Limitation Surface or the Procedures for Air Navigation Services Operations Surface as shown on the respective maps.
  - (15) Pursuant to cl 7.10 - Essential Services in LEP 2014, I am satisfied that the proposed development will have the listed services available when required.
- 5 Having reached the state of satisfaction that the decision is one that the Court could make in the exercise of its functions, s 34(3)(a) of the LEC Act requires me to “dispose of the proceedings in accordance with the decision”. The LEC Act also requires me to “set out in writing the terms of the decision” (s 34(3)(b)).
- 6 In making the orders to give effect to the agreement between the parties, the parties have not raised, and I am not aware of any jurisdictional impediment to the making of these orders. Further, I was not required to make, and have not made, any assessment of the merits of the DA against the discretionary matters that arise pursuant to an assessment under s 4.15 of the EPA Act.
- 7 The Court notes that Tweed Shire Council, as the relevant consent authority has agreed, under s 38(1) of the EPA Regulation to the Applicant amended development application DA 21/0517 in the following respects:

- (1) The inclusion of architectural drawings prepared by Ellivo Architects in replacement of corresponding earlier drawing as follows:

Drawing No.	Rev.	Title	Date
DA-0010	16	Site Plan & Project Information	7 March 2023
DA-0011	17	Ground Floor Plan — Context	7 March 2023
DA-1200	30	Basement Plan	7 March 2023
DA-1201	35	Ground Floor Plan	7 March 2023
DA-1202	35	Level 01 Floor Plan	7 March 2023
DA-1203	31	Level 02 Floor Plan	7 March 2023
DA-1204	35	Level 03 Floor Plan	7 March 2023
DA-1205	35	Roof Plan	7 March 2023
DA-1600	21	Area Plan	7 March 2023
DA-1603	11	Landscape Areas	7 March 2023

DA-2100	15	Building Elevations	7 March 2023
DA-2101	15	Building Elevations	7 March 2023
DA-2110	3	Street Elevations	7 March 2023
DA-3100	24	Building Sections	7 March 2023
DA-3101	22	Building Sections	7 March 2023
DA-3103	21	Building Sections	7 March 2023
DA-3104	3	Building Sections	7 March 2023

- (2) The inclusion of 'SEPP 65 Design Verification Statement' prepared by Dickson Rothschild dated 10 February 2023

8 The Court orders that:

- (1) The appeal is upheld.
- (2) The Applicant is to pay those costs of the Respondent thrown away as a result of the amendment of the application for development consent as agreed or assessed in accordance with s 8.15(3) of the *Environmental Planning and Assessment Act 1979*.
- (3) Development consent is granted to development application DA 21/0517, as amended, for the demolition of existing structures on site, construction of a four-storey residential flat building with basement car parking, swimming pool and related landscaping subject to the conditions set out in Annexure A.

**D Dickson**

**Commissioner of the Court**

Annexure A

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