



Land and Environment Court New South Wales

Medium Neutral Citation:

**Haralambis v Northern Beaches Council [2022]
NSWLEC 1186**

Hearing dates:

Conciliation Conference 30 March 2022

Date of orders:

08 April 2022

Decision date:

08 April 2022

Jurisdiction:

Class 1

Before:

Dickson C

Decision:

The Court orders that:

(1) The appeal is upheld.

(2) Development consent is granted to DA2021/1719 in respect of property at 7 Ozone Street, Freshwater, comprising Lot 26 in Deposited Plan 6098, for demolition of all existing structures, subdivision into two lots and construction of two new dwelling houses with swimming pools, subject to the conditions of consent in Annexure 'A'.

Catchwords:

DEVELOPMENT APPLICATION- demolition – subdivision - construction of two new residential dwellings – amended plans – 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, cl 55

Interpretation Act 1987, ss 5, 30

Land and Environment Court Act 1979, ss 34, 34AA

State Environmental Planning Policy (Infrastructure) 2007, cl 45

State Environmental Planning Policy No. 55 Remediation of Land, 1998, cl 7

State Environmental Planning Policy (Resources and Energy) 2021

Warringah Local Environmental Plan 2011, cl 2.3, 2.7, 4.1, 4.3, 4.4, 5.10, 6.1, 6.2, 6.4

Category:

Principal judgment

Parties:	Aristidis Haralambis (Applicant) Northern Beaches Council (Respondent)
Representation:	Solicitors: G Shapiro, Hones Lawyers (Applicant) J Simpson, Northern Beaches Council (Respondent)
File Number(s):	2021/337164
Publication restriction:	No

JUDGMENT

- 1 **COMMISSIONER:** The proceedings are an appeal pursuant to s 8.7 of the Environmental Planning and Assessment Act 1979 (EPA Act) by the Applicant against the deemed refusal of Development Application No. DA2021/1719 by Northern Beaches Council (the Respondent). The development application seeks consent for the demolition of existing structures, subdivision into lots and construction of two new dwelling houses and swimming pools. The development is proposed at 7 Ozone Street, Freshwater (Lot 26 in DP 6098).
- 2 The proceedings commenced with a conciliation conference on 30 March 2022 in accordance with s 34AA of the Land and Environment Court Act 1979 (LEC Act). No member of the public sought to be heard in relation to the matter. Prior to the conciliation the Applicant amended their development application with the consent of the Respondent and uploaded the amended development application to the NSW Planning Portal on 18 March 2022. The amendments to the development application comprise:
 - New boundary configurations between proposed Lot 1 and Lot 2;
 - Turning bay removed from Lot 1;
 - Permeable paving and stepping stones replaced with soft landscaping on Lot 1;
 - Landscaping for Lot 1 increased;
 - Car turntable for Lot 2 removed.
- 3 Agreement was reached between the parties at the conciliation conference on 30 March 2022. That decision is that the appeal is upheld, and the development application is approved, subject to the conditions of consent annexed to this judgment: pursuant to s 4.16(1) of the EPA Act.
- 4 In exercising the functions of the consent authority on the appeal, the Court has the power to determine the development application pursuant to ss 4.15 and 4.16 of the EPA Act. The final orders in this appeal, outlined below, are made as a result of an agreement between the parties that was reached at a conciliation conference.

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) The owners of the site have both provided their consent to the lodgement of the development application.
- (2) The development application was notified to adjoining and proximate properties for a period of seven days. I am satisfied that the submissions have been considered in the determination of the development application: s 4.15(1)(d) of the EPA Act. In particular, I am satisfied that the objections raised have been appropriately considered in amendments to the application, or in the imposition of conditions of consent.
- (3) Warringah Local Environmental Plan 2011 (LEP 2011) applies. The site is zoned R2 – Low Density Residential and dwelling houses and subdivision are permitted with consent. Demolition is permissible pursuant to cl 2.7 of LEP 2011. In determining the development application, I have had regard to the objectives of the zone; cl 2.3(2) of LEP 2011.
- (4) Clause 4.1 of LEP 2011, 'Minimum subdivision lot size' applies to the proposed lots as the development seeks subdivision. The development application complies with the minimum lot size of 450m².
- (5) Pursuant to cl 4.3 of LEP 2011, 'Height of Buildings', the maximum height development standard for the site is 8.5m. The development application complies with this height standard.
- (6) The site is not classified on the Acid Sulfate Soils Map, therefore cl 6.1 of LEP 2011 is not applicable: cl 6.1(2) of LEP 2011.
- (7) Clause 6.2 of LEP 2011, 'Earthworks', contains a list of matters that must be considered by the consent authority in the determination of a development application. The development application is accompanied by a Geotechnical Report prepared by 'White Geotechnical Group' and engineering plans by N B Consulting Engineers, which both address the matters listed for consideration at cl 6.2(3) of LEP 2011. In determining the development application, I have given consideration to these matters, and I am satisfied none warrant the refusal of the development application.
- (8) The site is mapped as 'Area B: Flanking Slopes 5 to 25' under cl 6.4 'Sloping Land' in LEP 2011. Pursuant to cl 6.4(3) in LEP 2011, the consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that:
 - (a) the application for development has been assessed for the risk associated with landslides in relation to both property and life, and
 - (b) the development will not cause significant detrimental impacts because of stormwater discharge from the development site, and
 - (c) the development will not impact on or affect the existing subsurface flow conditions.

- (9) The development application is accompanied by a Geotechnical Report prepared by 'White Geotechnical Group' and engineering plans by N B Consulting Engineers which both address the preceding matters. Further, the annexed conditions of consent require compliance with all recommendations of the Geotechnical Report. I am satisfied that the matters at cl 6.4(3) in LEP 2011 are satisfied.
- (10) Satisfying cl 45(2) of *State Environmental Planning Policy (Infrastructure) 2007* (SEPP Infrastructure) the development application was referred to Ausgrid who confirm they have no objection to the development.
- (11) The development application is accompanied by a BASIX certificate for both of the proposed dwellings, satisfying the requirements of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.
- (12) State Environmental Planning Policy (Resources and Energy) 2021 (SEPP RAE) came into force on 1 March 2022. Whilst the SEPP RAE transfers the provisions of State Environmental Planning Policy No 55—Remediation of Land (SEPP 55) to the new SEPP RAE, the provisions of SEPP 55 continue to have effect for the development application by dint of sections 5(6) and 30(2)(d) of the *Interpretation Act 1987*. Consideration has been given as to whether the subject site is contaminated as required by cl 7(1) of SEPP 55. The parties have provided historical information and imagery that confirms that the long-term use of the site has been residential. The original house and garage appear to have been constructed circa 1947/1950 under building application for Warringah Shire Council "dwelling and garage". Council records do not show any other intermediate land use, other than residential, since construction of the original dwelling house. I accept that the site will be suitable for the proposed development.

6 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)).

7 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, any assessment of the merits of the development application against the discretionary matters that arise pursuant to an assessment under s 4.15 of the EPA Act.

8 The Court notes that:

- (1) That Northern Beaches Council, as the relevant consent authority, agreed, under cl 55(1) of the Environmental Planning and Assessment Regulation 2000, to the Applicant amending Development Application No. DA2021/1719 and rely upon the amended plans and documents referred to in Condition 1 of the conditions of consent at Annexure A.

(2)

That the amended development application has been uploaded on the NSW planning portal on 18 March 2022.

- (3) That the applicant filed the amended development application with the Court on 25 March 2022.

9 The Court orders that:

- (1) The appeal is upheld.
- (2) Development consent is granted to DA2021/1719 in respect of property at 7 Ozone Street, Freshwater, comprising Lot 26 in Deposited Plan 6098, for demolition of all existing structures, subdivision into two lots and construction of two new dwelling houses with swimming pools, subject to the conditions of consent in Annexure 'A'.

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D M Dickson

Commissioner of the Court

[Annexure A \(263453,.pdf\)](#)

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Decision last updated: 08 April 2022