



Land and Environment Court  
New South Wales

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Case Name:	Pryor v Northern Beaches Council
Medium Neutral Citation:	[2022] NSWLEC 1443
Hearing Date(s):	Conciliation conference held on 15 August 2022
Date of Orders:	24 August 2022
Decision Date:	24 August 2022
Jurisdiction:	Class 1
Before:	Bish C
Decision:	<p>The Court orders that:</p> <p>(1) The appeal is upheld.</p> <p>(2) The amended written request made pursuant to clause 4.6 of the Warringah Local Environmental Plan 2011 (WLEP), dated 9 August 2022, prepared by Greg Boston of Blyth Fleming Town Planners, which seeks to vary development standard in clause 4.3 – Height of Buildings of the WLEP is upheld.</p> <p>(3) Development Application No. DA2021/1801 for demolition works and construction of a dwelling house, including a swimming pool and driveway on land at Lot 23 DP23447, known as 55 Woolgoolga Street, North Balgowlah is determined by grant of consent, subject to the conditions set out in Annexure ‘A’.</p>
Catchwords:	DEVELOPMENT APPLICATION – dwelling - stormwater management – amend conditions of consent - breach in height development standard – cl 4.6 request for variation of standard - conciliation conference conciliation conference – agreement between the parties – orders
Legislation Cited:	<p>Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 4.17, 8.7</p> <p>Environmental Planning and Assessment Regulation</p>

2000, cll 49, 55  
Land and Environment Court Act 1979, s 34, s 34AA  
State Environmental Planning Policy (Building  
Sustainability Index: BASIX) 2004  
Warringah Local Environmental Plan 2011, cll 2.3, 4.3,  
4.6

Texts Cited: Warringah Development Control Plan 2011

Category: Principal judgment

Parties: Rory Pryor (Applicant)  
Northern Beaches Council (Respondent)

Representation: Solicitors:  
G McKee, McKees Legal Solutions (Applicant)  
J Simpson, Northern Beaches Council (Respondent)

File Number(s): 2022/134464

Publication Restriction: No

## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against conditions of consent issued for Development Application DA2021/1801 by Northern Beaches Council (hereafter the Council) which seek deletion of conditions relating to a secondary dwelling and stormwater disposal on Lot 23, DP 23447, also known as 55 Woolgoolga Street, North Balgowlah (the site).

### Background

- 2 The application DA2021/1801 was approved by Council on 20 April 2022, after notification (11 submissions were received during the notification period), internal review and consideration by the Northern Beaches Local Planning Panel.
- 3 The applicant appealed against conditions 4, 12(h) and 15 of the consent as granted, pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 4 The Court agreed to a conciliation conference, pursuant to s 34AA of the *Land and Environment Court Act 1979* (LEC Act), with an onsite view at the request

of the parties, and then to conference by Microsoft Teams. Six residents provided oral submission at the commencement of the conciliation.

- 5 The Council agreed for the applicant to amend the plans and documents that support and amend the DA, pursuant to cl 55 of the Environmental Planning and Assessment Regulation 2000 (EPA Reg).
- 6 Based on the amended DA and agreed conditions of consent, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. The parties agree that the contentions of Council have been considered and are resolved, and the issues raised by residents are sufficiently addressed. The decision of the parties is to grant consent to application DA2021/1801, with conditions.
- 7 Pursuant to s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision if it is a decision that the Court could have made in the proper exercise of its functions. The parties' decision involves the Court exercising its function under s 4.16 of the EPA Act and being satisfied, pursuant to s 4.15, to grant consent to application DA2021/1801, subject to conditions in Annexure 'A'.

### **Jurisdictional prerequisites**

- 8 Section 4.15(1) of the EPA Act establishes the matters to be considered in determining the development application. The following jurisdictional requirements have been specifically considered and are satisfied:
  - (1) Warringah Local Environmental Plan 2011 (WLEP):
    - (a) Pursuant to cl 2.3 of the WLEP, the proposed residential development is situated over land zoned R2 Low Density Residential. The proposed development as described to the Court is permissible with consent. The amended DA sufficiently addresses all the relevant objectives, aims, standards and requirements of the WLEP, however there is a breach of the 8.5m height development standard by up to 27.8%, pursuant to cl 4.3.
    - (b) The amended DA relies on a cl 4.6 written request, seeking a variation of the non-compliant height, pursuant to cl 4.6 of the WLEP. The cl 4.6 written request provided to the Court explains that the non-compliance in the height standard does not result in a development that is incompatible with the character of the surrounding area or results in adverse amenity, including solar

access. The elements of the proposed development that result in the non-compliance will not perceptibly change the presentation of the proposed building to the streetscape or result in adverse bulk/scale impacts to adjoining developments. According to the cl 4.6 written request, the proposed development is consistent with the zone objectives and relevant development standard for cl 4.3.

- (c) The Court must be satisfied to grant consent to the DA that the cl 4.6 request to vary the standard is appropriately addressed, pursuant to the requirements set out in cl 4.6 of the WLEP. Having reviewed the cl 4.6 written request and evidence before the Court, I am satisfied that the written request for variation of the height standard describes sufficient environmental planning grounds to justify the non-compliance, and that strict compliance of the standard would be both unreasonable and unnecessary. The proposed development, as described to the Court, is consistent with the objectives of the zone (R2) and height (cl 4.3) standard. The breach in the height standard will not cause undue concern to (existing and future) surrounding residents, the streetscape, or those utilising the site. The concerns raised by residents have been addressed by the proposed amendments to the design of the dwelling, which do not result from the standard non-compliances. The proposed development is in the public interest. I accept that there is no significant consequence to State or Regional environmental planning matters as a result of varying the development standard in this instance, and that there is no public benefit to maintaining the height standard for the proposed development.
- (d) It is noted that the amended application does not result in a new breach in the height standard, and that the amendments made to the DA, result in a reduction in the already approved height non-compliance. I am satisfied that the requirements of cl 4.6 of the WLEP have been addressed, and that a variation in the cl 4.3 height development standard should be granted.

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

- (a) A BASIX Certificate (1237014S\_02) issued on 8 February 2022 is relevant to the proposed development, as amended, and is identified in the conditions of consent and supports the amended DA.

(3) Warringah Development Control Plan 2011 (WDCP):

- (a) The relevant requirements of the WDCP are generally complied with, based on the amended plans, supporting documents to the DA and the conditions of consent. The original application was publicly notified in accordance with the WDCP, and the submissions received have been adequately considered and assessed. In response to resident concerns, particularly

regarding stormwater, the Council has undertaken the appropriate merit assessment, to ensure any impacts from the proposed development are minimised. The applicant has demonstrated that the majority of overland flow to downgradient properties is sourced beyond the site, that an easement is neither feasible nor practical, and the proposed onsite storage of stormwater with discharge via a spreader is appropriate.

### **Grant of consent**

- 9 Based on the amended plans and supporting documents to the DA, the parties explained to the Court that there are no jurisdictional impediments to the making of the agreement or for the Court in making the orders, as sought.
- 10 The Council has undertaken the appropriate merit assessment of the proposed development, including considering the resident submissions. The Court notes that the issues raised by residents with regards to stormwater overland flow are a significant concern to these residents, however the issues have been addressed by the merit assessment undertaken by Council. As observed by the Court during the site view, and confirmed by the parties experts, stormwater overland flow in the local area appears to be an upgradient catchment wide issue that is principally sourced beyond the site and not generally affected by the application under appeal and before the Court.
- 11 I am satisfied, based on the evidence before me, that there are no jurisdictional impediments to this agreement and that application DA2021/1801 can be granted consent, as it satisfies the relevant requirements of s 4.15 of the EPA Act.
- 12 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.
- 13 The Court notes that:
  - (1) Northern Beaches Council, as the relevant consent authority, has agreed, under cl 55(1) of the Environmental Planning and Assessment Regulation 2000, to the applicant amending Development Application DA2021/1801.
  - (2) The amended application documents were lodged on the NSW Planning Portal on 15 August 2022.
  - (3) The amended application was filed with the Court on 15 August 2022.

14 The Court orders that:

- (1) The appeal is upheld.
- (2) The amended written request made pursuant to clause 4.6 of the Warringah Local Environmental Plan 2011 (WLEP), dated 9 August 2022, prepared by Greg Boston of Blyth Fleming Town Planners, which seeks to vary development standard in clause 4.3 – Height of Buildings of the WLEP is upheld.
- (3) Development Application No. DA2021/1801 for demolition works and construction of a dwelling house, including a swimming pool and driveway on land at Lot 23 DP23447, known as 55 Woolgoolga Street, North Balgowlah is determined by grant of consent, subject to the conditions set out in Annexure ‘A’.

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**Sarah Bish**

**Commissioner of the Court**

**Annexure A (342413, pdf)**

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