Land and Environment Court

New South Wales

Case Name:	Mailman v Northern Beaches Council
Medium Neutral Citation:	[2021] NSWLEC 1626
Hearing Date(s):	Conciliation conference on 29 September 2021
Date of Orders:	20 October 2021
Decision Date:	20 October 2021
Jurisdiction:	Class 1
Before:	Peatman AC
Decision:	The Court Orders: (1) The variation to the area development control is granted pursuant to clause 4.6 of the Warringah Local Environmental Plan 2011. (2) The appeal is upheld. (3) Consent is granted to Development Application No. DA2021/0089 for the subdivision of Lot A in Deposited Plan 359775 at 6 Brighton Street, Freshwater NSW into two (2) lots, subject to the conditions contained in Annexure "A". (4) The Applicant is to pay the Respondent's costs thrown away pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979 in the amount of $2,000 within 28 days of the Orders being made by the Court.
Catchwords:	DEVELOPMENT APPLICATION – subdivision – cl 4.6 variation – conciliation conference – agreement between the parties – orders
Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 4.17, 8.7, 8.10, 8.14 Environmental Planning and Assessment Regulation 2000, cll 49, 55, 77 Land and Environment Court Act 1979, ss 17(d), 34, 39

	State Environmental Planning Policy (Coastal Management) 2018, cll 13, 15 State Environmental Planning Policy No. 55 – Remediation of Land, cl 7 Warringah Local Environmental Plan 2011, cll 4, 5, 6
Texts Cited:	Northern Beaches Council, Water Management for Development Policy 2021, cl 10, 11 Warringah Development Control Plan 2011 cl C1, C3
Category:	Principal judgment
Parties:	Greg Mailman (Applicant) Northern Beaches Council (Respondent)
Representation:	Counsel: A Sattler (Solicitor) (Applicant) J Simpson (Solicitor) (Respondent) Solicitors: Sattler & Associates (Applicant) Northern Beaches Council (Respondent)
File Number(s):	2021/172755
Publication Restriction:	No

JUDGMENT

1 **COMMISSIONER:** The Applicant appeals the Northern Beaches Council's (Council) determination of Development Application No. DA2021/0089 (DA) by way of refusal pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act).

2 The proceedings fall within Class 1 of the Court's jurisdiction pursuant to s 17(d) of the *Land and Environment Court Act 1979* (LEC Act).

Background

3 The DA seeks development consent for the subdivision of the land known as 6 Brighton Street, (being a corner site with Corella Street) at Freshwater, NSW (Site) into two allotments:

(1) The proposed lot sizes are:

(a) Lot 1: 442.2m2; and

(b) Lot 2: 441.7m2.

(2) The frontages of the proposed lots are:

(a) Lot 1: 10.058m and being accessible from Brighton Street; and

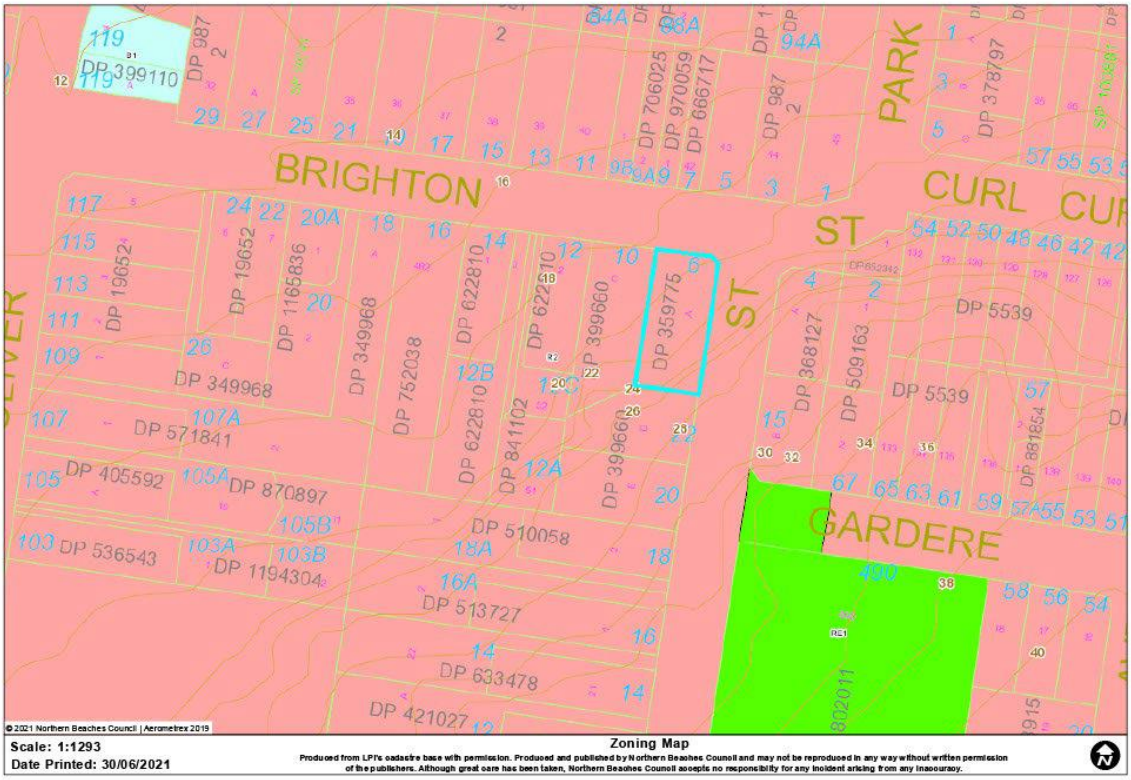
(b) Lot 2: 7.997m and being accessible from Brighton Street.

4 The Site consists of a single allotment and is legally described as Lot A in DP 359775. The Site has an approximate area of 883.9m2, and is generally rectangular in shape.

5 The Site currently accommodates a single storey dwelling house, comprising rendered brick and a flat metal roof. Vehicular access is gained via Brighton Street. It is not proposed in the DA to demolish the existing dwelling house, and nor is the DA for the constructions of new dwelling houses.

6 The Site is zoned R2 Low Density Residential under the Warringah Local Environmental Plan 2011 (WLEP 2011).

7 The surrounding environment largely comprises detached, low density residential development of 1-2 storeys in height. There is a group of semi-detached dwellings located approximately 22m to the north of the Site at 9, 9A and 9B Brighton Street. An extract of the Council's Land Zoning Map is below, with the Site boundary marked in a blue line:



8 The Court arranged a conciliation conference under s 34(1) of the LEC Act between the parties, which was held on 30 September 2021. I presided over the conciliation conference.

9 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 granting a variation to the Council's development standard of the minimum area required for residential allotments, upholding the appeal and granting consent subject to conditions.

10 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 ss 4.16 and 8.14 of the EPA Act and ss 34(3) and 39(2) of the LEC Act. 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 as set out below, and explained how the jurisdictional prerequisites have been satisfied:

(1) The DA was lodged with Council on 19 March 2021. Owner's consent was given to the lodgement of the DA in accordance with cl 49 of the Environmental Planning and Assessment Regulation (EPA Regulation).

(2) Council notified the DA in accordance with cl 77 of the EPA Regulation from 24 March 2021 to 7 April 2021, and received 2 submissions. The objectors raised the following issues:

    (a) Boundary fence;

    (b) Retention of trees on the Site;

    (c) Proposed buildings;

(3) On 26 May 2021 the Council determined the DA by way of refusal.

(4) The Applicant's appeal was filed on 16 June 2021 pursuant to s 8.7(1) of the EPA Act, and in accordance with the time provisions of 8.10 of the EPA Act.

(5) State Environmental Planning Policy No. 55 – Remediation of Land (SEPP 55) applies to the Site. SEPP 55 requires the consent authority to consider whether the Site is contaminated. The Site has been used for residential purposes for a significant period of time with no prior different land uses. The Site does not pose a risk of contamination, and as such, the Site is suitable for the proposed use.

(6) State Environment Planning Policy (Coastal Management) 2018 (Coastal SEPP) applies to the Site, which is located within the Coastal Environment Area Map. Clauses 13 and 15 of the Coastal SEPP apply. Council is satisfied that the proposed development can be designed, sited and managed with conditions to avoid an adverse impact on the coastal environment. The proposed development is not likely to cause an increased risk of coastal hazards on the Site or other land.

(7) The Site is zoned R2 Low Density Residential under the WLEP 2011. The objectives of the R2 Low Density Residential Zone are:

    (a) To provide for the housing needs of the community within a low density residential environment.

    (b) To enable other land uses that provide facilities or services to meet the day to day needs of residents.

    (c) To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.

(8) The parties agree that the proposed development is consistent with the objectives of the R2 Zone for the following reasons:

    (a) The DA will cater for the housing needs of the community within a low density residential environment;

    (b) The DA will not prevent other sites from providing facilities or services to meet the day to day needs of residents in the locality;

(c) The DA will accommodate reasonably sized dwellings on the proposed allotments in accordance with Council's current planning guidelines.

(9) The DA does not comply with the Minimum Subdivision Lot Size in principal development standard set out in cl 4.1(3) of WLEP 2011, which specifies a minimum lot size of 450m2 for the Site as shown on Council's Lot Size Map (area development standard). The DA proposes the subdivision of the Site into 2 allotments: 1 being 442.2m2 and the 2nd being 441.7m2.

(10) The non-compliance with the area standard has been resolved by a written Revised clause 4.6 Variation Request by Charles Hill, town planner, dated 8 June 2021 which seeks a variation to the area development standard (Revised 4.6 Variation Request).

(11) The parties agree that:

(a) The Revised Clause 4.6 Variation Request adequately addresses the following matters that are required to be demonstrated under cl 4.6(3) of WLEP 2011:

(i) That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(ii) That there are sufficient environmental planning grounds to justify contravening the area development standard.

(b) The Revised Clause 4.6 Variation Request relies upon the following ways to demonstrate that compliance with the area development standard is unreasonable or unnecessary in the circumstances of the case, as articulated in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827:

(i) That the objectives of the development standard in cl 4.1(1) of the WLEP 2011 are achieved; and

(ii) That an objective of the development standard in cl 4.1(1) of the WLEP 2011 is not relevant to the DA.

(c) The Revised Clause 4.6 Variation Request demonstrates that compliance with the Minimum Subdivision Lot Size principal development standard is unreasonable and unnecessary as the objectives of the development standard are met notwithstanding the noncompliance.

(d) The Revised Clause 4.6 Variation Request adequately establishes sufficient environmental planning grounds that justify the breach of the Minimum Subdivision Lot Size principal development standard.

(12) Pursuant to cl 4.6(5) of the WLEP 2011 the DA is not considered to raise any matter of significance for State or regional development.

(13) The parties agree that the proposed development will be in the public interest because it is consistent with the objectives of the Minimum Subdivision Lot Size development standard and the objectives of the R2 Zone as outlined in par [10(7)] above.

(14) Clause 6.1 of the WLEP 2011 requires the consent authority to ensure that development does not disturb, expose or drain acid sulfate soils and cause environmental damage. The Site is not within Council's mapped areas defined as "Class 1" to "Class 5", and as a result, there is no need for an acid sulphate soils assessment or management plan.

(15) While the DA does not comply with clause C1 of the Warringah Development Control Plan 2011 (WDCP 2011) in relation to subdivision lot size in the R2 Zone, this non-compliance is addressed by the Revised 4.6 Variation Request as referred to in para [10(10-(15)] above.

(16) The stormwater development controls in clause C4 of WDCP 2011 apply to the Site, and well as sections 10 and 11 of Council's Water Management for Development Policy 2021. The stormwater issues have been dealt with in the expert report by Bruce Lewis, principal engineer with Peninsula Consulting Engineers, 'Flood Risk Assessment Report' dated 14 July 2021. The conclusions of Mr Lewis on p3 of his report state:

    (i) "The provision of a waterproof reinforced masonry fence along the eastern boundary of the subject property, connecting to the front boundary fence of 22 Corella Street, and being at least 300mm in height above the 1%AEP top water level…

    (ii) "This is to be constructed on the private property side of the boundary, at the Developer's cost. The structural engineer is to design a suitable flood compatible wall off a suitable footing to resist the proposed flood loads.

    (iii) "This will ensure that flood flows from Corella Street and other public areas uphill from the subject property, will not affect the subject property in any storm up to & beyond the 1%AEP storm.

    (iv) "No further requirements are necessary for the subject property, in respect of floor levels related to the flooding.

    (v) "The installation of a flood proof fence along the eastern boundary will improve the flooding outcomes for existing properties to the west of the subject site."

(17) The requirement for the installation of a reinforced masonry fence along the eastern boundary of the Site (see condition 3 in Annexure A) meets the requirements of the stormwater development controls in C4 of WDCP 2011 and sections 10 and 11 of Council's Water Management for Development Policy 2021.

(18) In relation to s 4.15(1)(b)-(e) of the EPA Act, the parties agree that:

(a) For the purposes of s 4.15(1)(b), the likely impacts of the development are acceptable, in particular that the DA will not have a detrimental social impact or economic impact in the locality considering the nature of the existing and proposed land use.

(b) For the purposes of s 4.15(1)(c), the Site is suitable for the development.

(c) For the purposes of s 4.15(1)(d), and in light of the provision of the Flood Risk Assessment Report (see par [10(19)-(21)] above), the submissions made in respect of the DA do not warrant refusal of the DA.

(d) For the purposes of s 4.15(1)(e), there is no relevant matter arising out of the consideration of the public interest that would require the refusal of the DA.

(19) In relation to the matters raised in submissions by the objectors (par [10(2)] above), the parties agree that these issues have been resolved as follows:

(a) The DA seeks consent for subdivision only;

(b) The incorporation of the proposed waterproof reinforced masonry fence along the eastern boundary of the Site resolves the stormwater impacts to the satisfaction of the Council;

(c) A boundary fence is not proposed as part of the DA, but may be the subject of a further development application in respect of the construction of buildings on the subdivided Site;

(d) The issue relating to the retention of trees relates to a Camphor Laurel proximate to the rear boundary of the Site and is not proposed to be removed by the DA.

(20) The parties agree that the proposed conditions of consent may be lawfully imposed having regard to the provisions of ss 4.16 and 4.17 of the EPA Act.

11 The definition of “development standard” in cl 1.4 of the EPA Act includes:

> the area, shape or frontage or any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point, …

(a) Clause 4.1 of WLEP 2011 relates to a minimum lot size, and therefore it is a development standard.

12 Clause 4.1 – Minimum subdivision lot size of WLEP 2011 provides:

(1) “The objectives of this clause are as follows –

(a) to protect residential character by providing for the subdivision of land that results in lots are that consistent with the pattern, size and configuration of existing lots in the locality,

(b) to promote a subdivision pattern that results in lots that are suitable for commercial and industrial development,

(c) to protect the integrity of land holding patterns in rural localities against fragmentation,

(d) To achieve low intensity of land use in localities of environmental significance,

(e) To provide for appropriate bush fire protection measures on land that has an interface to bushland,

(f) To protect and enhance existing remnant bushland,

(g) To retain and protect existing significant natural landscape features,

(h) To manage biodiversity,

(i) To provide for appropriate ”storm water management and sewer infrastructure.

13 Clause 4.6 – Exceptions to Development Standards of WLEP 2011 provides:

(1) The objectives of this clause are as follows:-

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

14 The nature and extent of the variation of the development standard is as follows:

(1) Clause 4.1(3) of WLEP 2011 specifies a minimum lot size of 450m for the subject locality;

(2) The DA proposes 1 allotment be subdivided into 2 as follows:

(a) Lot 1 with an area of 442.2m2 – a variation of 1.7%;

(b) Lot 2 with an area of 441.7m2 – an area of 1.8%.

15 I am satisfied that the Applicant complies with the tests in *Wehbe* and *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 as to whether the cl 4.6 variation should be upheld having regard to the Revised clause 4.6 Variation of which I only set out discrete sections below, but I rely upon the whole report:

(1) Is compliance with cl 4.1 of WLEP 2011 unreasonable or unnecessary? (par [4.2] on pp 9-10):

(a) The DA protects the residential character by providing for the subdivision of land that results in lots that are not inconsistent

with the pattern, size and configuration of existing lots in the locality;

(b) The DA reflects the existing pattern of subdivision in this residential zone and regulates the density of lots to ensure that it is of a minimum size that would be sufficient to provide a useable area for building and landscaping;

(c) In addition, whilst not part of this DA, any future development is capable of maintaining the character of the locality and streetscape and, in particular, the prevailing subdivision pattern.

(2) Are there sufficient environmental planning grounds to justify contravening the development standard"? ([4.3] on pp 11-12):

(a) "The proposed subdivision satisfies the objectives of the R2 Residential zone as well as the objectives of the standard for minimum lot size.

(b) "A variation to the minimum lot size in this instance would provide an opportunity for an increase in the variety and choice of housing which would otherwise not be available if the minimum lot size was not varied, given the availability of existing infrastructure in this locality;

(c) "Each allotment is of a sufficient size to adequately accommodate a usable area for both building and landscaping without compromising the overall appearance of density within this locality;

(d) "The proposed subdivision is not inconsistent with the subdivision pattern along the Brighton Street frontage and character of the locality;

(e) "The proposed subdivision will not have adverse impacts on the streetscape of Brighton Street, and any subsequent development of those two allotments will have no adverse impacts in terms of visual intrusion, and or loss of solar access;

(f) "Approval of the proposed subdivision and the subsequent erection of 2 dwellings will facilitate the new dwellings having a 500mm freeboard above the predicted 1 in 100 year ARI water surface level for the floor of habitable rooms;

(g) "The provision of a waterproof reinforced masonry fence along the eastern boundary of the subject property will ensure that flood flows from Corella Street and other public areas uphill from the subject property will not affect the subject property in any storm up to & beyond the 1%AEP Storm.

(h) "The installation of a flood proof fence along the eastern boundary will also improve the flooding outcomes for existing properties to the west of the subject site."

(3) Is the DA in the public interest because it is consistent with the objectives of cl 4.1 of WLEP 2011, and the objectives of the R2 Low Density Residential Zone?

(a) The Revised cl 4.6 Variation Request demonstrates that the DA meets the relevant applicable objective test in cl 4.1 of WLEP 2011. As it meets the relevant objective, it follows that it is consistent with that objective.

(b) The parties are satisfied that the DA meets the objectives of the Zone R2 Low Density Residential, i.e. to provide for the housing needs of the community within a low density residential development. The DA will provide an opportunity to increase the variety and choice of housing to meet the community needs within a low density residential development.

16 I am satisfied that the variation to cl 4.6 of WLEP 2011 should be upheld because:

(1) Clause 4.1 of WLEP 2011 is a development standard;

(2) Compliance with cl 4.1 of WLEP 2011 is unreasonable and unnecessary in the circumstances of this case;

(3) There are sufficient environmental planning grounds to justify contravening the development standard;

(4) The DA is consistent with the objectives of cl 4.1 of WLEP 2011, and the objectives of the Zone R2 Low Density Residential in WLEP 2011.

(5) I have considered the matters in cl 4.6(5) of WLEP and the proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it relates to the subdivision of 1 allotment into 2 allotments. Further, the proposed subdivision is not readily transferable to any other site in the immediate locality, or wider region of the State, and the scale or nature of any subsequent proposed development does not trigger requirements for a higher level of assessment, or necessarily set a precedent for developments of a similar nature. The DA is in the public interest.

17 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.

18 I note that the Council has agreed to the Applicant amending the DA in accordance with cl 55 of the EPA Regulation.

19 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. I shall uphold the appeal, and grant consent to the DA pursuant to ss 4.16 and 8.14 of

the EPA Act, and ss 34(3) and 39(2) of the LEC Act, together with granting the variation of the development standard in cl 4.6 of WLEP 2011.

20 The Court notes:

(1) The Respondent, Northern Beaches Council, as the relevant consent authority, has lodged the Amended Development Application on the NSW Planning Portal on 28 September 2021, reference number PEH-776.

(2) The Applicant has filed the Amended Development Application with the Court on 28 September 2021.

21 The Court Orders:

(1) The variation to the area development control is granted pursuant to clause 4.6 of the Warringah Local Environmental Plan 2011.

(2) The appeal is upheld.

(3) Consent is granted to Development Application No. DA2021/0089 for the subdivision of Lot A in Deposited Plan 359775 at 6 Brighton Street, Freshwater NSW into two (2) lots, subject to the conditions contained in Annexure "A".

(4) The Applicant is to pay the Respondent's costs thrown away pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act* 1979 in the amount of $2,000 within 28 days of the Orders being made by the Court.

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M Peatman

Acting Commissioner of the Court

Annexure A (159374, pdf)

Subdivision Plan (47783, pdf)

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