



Land and Environment Court
New South Wales

Case Name: Co-ordinated Projects Pty. Limited v Northern Beaches Council

Medium Neutral Citation: [2022] NSWLEC 1055

Hearing Date(s): Conciliation conference on 1 February 2022

Date of Orders: 08 February 2022

Decision Date: 8 February 2022

Jurisdiction: Class 1

Before: Chilcott C

Decision: The Court orders that:
(1) The Applicant's clause 4.6 written request seeking to vary the height of development standard under clause 4.3 of Warringah Local Environmental Plan 2011, in relation to the 11m height control applying to the site, is upheld.
(2) The appeal is upheld.
(3) Development Application No. DA2020/1425 for demolition of existing structures and construction of a 4 storey shop top housing development comprising 27 residential apartments, 3 retail tenancies and basement car parking on land legally described as Lot C in DP39108 and Lot 3 in DP975160, known as 1 Kenneth Road and 265 Condamine Street, Manly Vale is approved subject to the conditions set out in Annexure "A" to this agreement.

Catchwords: DEVELOPMENT APPLICATION – conciliation conference – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.16, 8.7
Environmental Planning and Assessment Regulation 2000, cl 2A, 55, 77, Pt 1, Sch 1

Land and Environment Court Act 1979, s 34
Roads Act 1993, s 138
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004, cl 6
State Environmental Planning Policy (Infrastructure) 2007, cl 45, 100
State Environmental Planning Policy No 55—
Remediation of Land, cl 7
State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development, cl 3, 28), Sch 1
Warringah Local Environmental Plan 2011, cl 2.3, 4.3, 4.6, 6.2

Texts Cited: Land and Environment Court of New South Wales, COVID-19 Pandemic Arrangements Policy (December 2021)
NSW Department of Planning and Environment, Apartment Design Guide, 2015

Category: Principal judgment

Parties: Co-ordinated Projects Pty Limited (Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
G McKee (Solicitor) (Applicant)
J Simpson (Solicitor)(Respondent)

Solicitors:
McKees Legal Solutions (Applicant)
Northern Beaches Council (Respondent)

File Number(s): 2021/262686

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** Co-ordinated Projects Pty Limited (the Applicant) has appealed the refusal by Northern Beaches Council (the Respondent) of its Development Application number DA2020/1425, made with owner's consent, seeking consent for demolition of existing structures and construction of a four storey shop top housing development, including 27 apartments and three

commercial units with basement car parking (the Proposed Development) at 265 Condamine Street, and 1 Kenneth Road, Manly Vale (the Subject Site).

- 2 The Respondent had notified the Applicant's development application pursuant to the provisions of cl 77 of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation), between 19 March and 1 April 2021.
- 3 The Applicant appealed the refusal of his development application under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and is determined under s 4.16 of the EP&A Act.
- 4 On 1 February 2022, the Parties participated in a s 34 conciliation conference and reached an in-principle agreement regarding the granting of consent to the DA, subject to conditions.
- 5 The conciliation conference was convened in a manner consistent with the Court's COVID-19 Pandemic Arrangements Policy (the Policy). A site view was not undertaken as part of the conciliation conference and no objector submissions were sought to be received in relation to the Proposed Development.
- 6 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 consent to the Applicant's development application, subject to conditions.
- 7 Under s 34(3) of the *Land and Environment Court Act 1979* (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.
- 8 There are jurisdictional matters that must be satisfied before the Court can exercise its power to grant consent to the Proposed Development, and those requirements have been satisfied as follows:
 - (1) in relation to the provisions of the State Environmental Planning Policy No 55 – Remediation of Land (SEPP55), cl 7(1)(a) requires the consent authority to consider whether the land is contaminated. The Parties advise, and I am satisfied that:
 - (a) the Development Application included:

- (i) a Geotechnical Assessment prepared by Crozier Geotechnical Consultants dated 10 August 2020;
 - (ii) a Preliminary Site Investigation prepared by Alliance Geotechnical dated 28 August 2020; and
 - (iii) a Detailed Site Investigation Report (DSI) prepared by Alliance Geotechnical dated 17 December 2021; and
 - (b) the Applicant's DSI had concluded that "detected concentrations of contaminants of potential concern, would not present an unacceptable human health exposure risk, to future commercial/industrial workers and residents, in the context of the proposed development (which includes basement excavation works across the site)"; and
 - (c) the Applicant's DSI made the following recommendations:
 - (i) a contaminated land data gap analysis investigation should be undertaken, and a report prepared detailing findings and recommendations;
 - (ii) a site-specific Remedial Action Plan should be prepared if the results of the contaminated land data gap analysis investigation and report identifies that contaminated material is required to be remediated or removed from the Subject Site.
 - (d) the recommendations made by the authors of the Applicant's DSI have been included in the Parties' agreed conditions of consent in this appeal; and
 - (e) the Subject Site will be suitable, after remediation for the purpose for which the development is proposed to be carried out in fulfilment of the provisions of cl 7 of SEPP55;
- (2) in relation to the provisions of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX):
- (a) clause 6 of SEPP BASIX requires that the Development Application be accompanied by a BASIX certificate;
 - (b) the Applicant has provided BASIX Certificate No. 1145175M_03 issued by Gartner Trovato Architects and dated 24 January 2022, and this certificate confirms that the project passes the BASIX requirements;
 - (c) the Applicant's BASIX Certificate satisfies the requirement in cl 2A in Pt 1 of Sch 1 of the EP&A Regulation;
- (3) in relation to the provisions of State Environmental Planning Policy (Infrastructure) 2007 (SEPP Infrastructure):
- (a) the Proposed Development was referred to Ausgrid in accordance with cl 45 of SEPP Infrastructure, and Ausgrid provided a response stating that the proposal is acceptable

subject to compliance with the relevant Ausgrid Network Standards and SafeWork NSW Codes of Practice; and

- (b) the Development Application was referred to Transport for NSW (TfNSW) in accordance with cl 100 of SEPP Infrastructure and s 138 of the *Roads Act 1993*, and TfNSW has provided concurrence, and required conditions of consent which have been included in the Parties' agreed conditions of consent;
- (4) in relation to the provisions of State Environmental Policy No. 65 – Design Quality of Residential Apartment Development (SEPP65):
- (a) the Proposed Development is defined as a residential apartment development in accordance with cl 3 of SEPP65, and the provisions of SEPP65 are applicable to the Applicant's development application;
 - (b) clause 28(2)(b) of SEPP65 requires that any development application to which the policy applies, is to be assessed against the nine design quality principles contained in Sch 1 of SEPP65;
 - (c) the proposal, as amended, complies with the design quality principles, and an assessment supporting this is provided at Annexure 2 of the Applicant's Statement of Environmental Effects prepared by Boston Blyth Fleming (BBF) Town Planners dated October 2020; and
 - (d) pursuant to the provisions of cl 28(2)(b) of SEPP65, the Development Application, as amended, complies with the Apartment Design Guide, and the Applicant has provided a compliance table and assessment within a SEPP65 Architect Design Verification Statement and Apartment Design Guide Compliance Table prepared by BBF Town Planners, and dated 1 February 2022;
- (5) in relation to the provisions of Warringah Local Environmental Plan 2011 (WLEP), the Parties advise, and I am satisfied, that:
- (a) the Subject Site is situated within Zone B2 Local Centre pursuant to the provisions of cl 2.3 of WLEP;
 - (b) the Applicant's development application seeks consent to construct a shop top housing development with basement car parking, and development for the purposes of shop top housing is a permitted use with consent within the Zone B2 Local Centre applicable to the Subject Site;
 - (c) Clause 2.3(2) of WLEP requires that regard must be had to the zone objectives within which the Proposed Development is located, and the Proposed Development complies with those objectives which are:
 - To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.

To encourage employment opportunities in accessible locations.

To maximise public transport patronage and encourage walking and cycling.

To provide an environment for pedestrians that is safe, comfortable and interesting.

To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment.

To minimise conflict between land uses in the zone and adjoining zones and ensure the amenity of any adjoining or nearby residential land uses.

- (d) Clause 4.3 of WLEP provides a maximum height of buildings (HoB) development standard of 11m which applies to development on the Subject Site. and the Proposed Development has a maximum height of building of 14.6m, and so exceeds the HoB development standard by 3.6m;
- (e) the Applicant has provided a written request, prepared pursuant to the provisions of cl 4.6 of WLEP, to vary the HoB development standard applicable to development on the Subject Site. The request was drafted by BBF Town Planners dated 25 November 2021, and the Parties agree that the request should be upheld, because:
 - (i) as required under cl 4.6(3)(a) of WLEP, the variation request confirms that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, as the Proposed Development achieves the objectives of the standard notwithstanding the non-compliance; and
 - (ii) as required under cl 4.6(3)(b) of WLEP, there are sufficient environmental planning grounds to justify contravening the development standard including for reasons associated with contextual responsiveness to streetscape and urban design, the distribution of floor space in response to established front setbacks, and in order to achieve the objectives of the EP&A Act;
 - (iii) as required under cl 4.6(4)(i), the Applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.3(3) of WLEP; and
 - (iv) as required under cl 4.6(4)(ii), the Proposed Development will be in the public interest because it is consistent with the objectives of the HoB standard and the objectives for development within the B2 zone in which the Proposed Development is to be carried out;

- (f) the provisions of cl 6.2 of WLEP apply to the Proposed Development as excavation is required to construct the basement level, and the matters identified in cl 6.2(3) of WLEP concerning earthworks have been considered by the Parties who have noted that the size of the proposed basement is considered acceptable, as it provides the required parking spaces, vehicular access and bin storage for the proposed Development.
- 9 Having considered the advice of the Parties, provided above at [8], I agree that the jurisdictional prerequisites on which I must be satisfied before I can exercise the power under s 4.16 of the EP&A Act have been so satisfied.
- 10 I am further 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.
- 11 As the Parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required to dispose of the proceedings in accordance with the Parties' decision.
- 12 In making the orders to give effect to the agreement between the Parties, I was not required to make, and have not made, any merit assessment of the issues that were originally in dispute between the Parties.
- 13 Finally, the Court notes that:
- (1) Northern Beaches Council, as the relevant consent authority has agreed, under cl 55 of the Environmental Planning and Assessment Regulation 2000, to allow the Applicant to amend its Development Application DA2020/1425, the subject of the proceedings, with the following amended plans and documents:

Approved Plans			
Drawing No.	Revision	Date	Prepared By
DA03 Site Plan	E	07.12.2021	Gartner Trovato Architects
DA04 Basement Plan	F	21.01.2022	Gartner Trovato Architects
DA05 Lower Ground Floor	F	21.01.2022	Gartner Trovato Architects

DA06 Level 01	F	21.01.2022	Gartner Trovato Architects
DA07 Level 02	F	21.01.2022	Gartner Trovato Architects
DA08 Level 03	F	21.01.2022	Gartner Trovato Architects
DA09 Level 04	F	21.01.2022	Gartner Trovato Architects
DA10 Elevations North & East	F	21.01.2022	Gartner Trovato Architects
DA11 Elevations South & West	F	21.01.2022	Gartner Trovato Architects
DA12 Sections 2 and 3	F	21.01.2022	Gartner Trovato Architects
DA13 Sections 1 and 4	F	21.01.2022	Gartner Trovato Architects
DA14 Views and Finishes Schedule	E	07.12.2021	Gartner Trovato Architects
DA17 Landscape Plan	E	07.12.2021	Gartner Trovato Architects

Engineering Plans

Reference	Revision	Date	Prepared By
D01 Lower Ground Floor Drainage & Part Site Stormwater Management Plan	4	02.12.2021	Istruct Consulting Engineers
D02 Level 01 Drainage & Part Site Stormwater Management Plan	4	02.12.2021	Istruct Consulting Engineers
D03 Basement Drainage Plan	2	02.12.2020	Istruct Consulting Engineers
D04 Level 02 Drainage Plan	2	02.12.2020	Istruct Consulting Engineers
D05 Level 03 Drainage Plan	2	02.12.2020	Istruct Consulting Engineers

D06 Level 04 & Lower Roof Drainage Plan	2	02.12.2020	Istruct Consulting Engineers
D07 Upper Roof Drainage Plan & Ocean Protect Details	2	02.12.2020	Istruct Consulting Engineers
Additional Amended Documents			
	Revision	Date	Prepared By
Access Assessment Report	R3	08.12.2021	BCA Access
Detailed Site Investigation Report	1	17.12.2021	Alliance Geotechnical Pty Ltd
BASIX Certificate 1145175M_03	-	24.01.2022	Gartner Trovato Architects

- (2) The Applicant uploaded its amended development application on the NSW planning portal on 13 January 2022 and 27 January 2022. The portal reference number is PEH-959 and PEH-975.
- (3) The Applicant filed the amended application with the Court on 21 December 2021, 23 December 2021, and 28 January 2022.

Orders

14 The Court orders that:

- (1) The Applicant's clause 4.6 written request seeking to vary the height of development standard under clause 4.3 of Warringah Local Environmental Plan 2011, in relation to the 11m height control applying to the site, is upheld.
- (2) The appeal is upheld.
- (3) Development Application No. DA2020/1425 for demolition of existing structures and construction of a 4 storey shop top housing development comprising 27 residential apartments, 3 retail tenancies and basement car parking on land legally described as Lot C in DP39108 and Lot 3 in DP975160, known as 1 Kenneth Road and 265 Condamine Street, Manly Vale is approved, subject to the conditions set out in Annexure "A" to this agreement.

M Chilcott

Commissioner of the Court

Annexure A (363968, pdf)

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