Land and Environment Court
New South Wales

Medium Neutral Citation:	**JV Co. 8 Pty Ltd v Shellharbour City Council [2019] NSWLEC 1301**
Hearing dates:	Conciliation conference on 12 June 2019
Date of orders:	28 June 2019
Decision date:	28 June 2019
Jurisdiction:	Class 1
Before:	Bish C
Decision:	The Court orders:

1) The Applicant is granted leave to amend development application DA0580/2017 to rely upon the following plans and documents:

a) Part Site + Floor Plan, Ref. 16079, DA1.05H, dated 16 April 2019;

b) Elevations, Ref. 16079, DA1.08D, dated 16 April 2019;

c) Level 1, 2 & 3 Plan, Ref 16079, DA1.06D, dated 12 June 2019;

d) Section and Fencing Details, Ref. 16079, SK8.01, Revision B, dated 16 April 2019;

e) Civil Works Plan Sheet 3, 300178121.01.DA103, Revision 05, dated 12 June 2019;

f) Siteworks Details, 300178121.01.DA556, Revision 05, dated 11 April 2019;

g) Written Request under Clause 4.6 Exceptions to Development Standards of Shellharbour Local Environmental Plan 2013: Lot 101 DP 1185867, No 11 Pioneer Drive, Oak Flats, dated April 2019;

h) Development Application form dated 23 November 2017.

2) The parties agree that the amendments made to the development application are not minor for the purposes of section 8.15(3) of the Environmental Planning & Assessment Act 1979. The Applicant is to pay the Respondent's costs thrown away as a consequence of the amendments as agreed or assessed.

3) The written request prepared by Michael Brown Planning Strategies, and dated April 2019, pursuant to cl 4.6 of the Shellharbour Local Environmental Plan 2013 (SLEP) in relation to cl 4.3 of the SLEP has been considered and the necessary state of satisfaction under cl 4.6(4) of the SLEP has been met. Consequently, the written request is well founded and upheld.

4) The appeal is upheld.

5) Development consent is granted to development application DA0580/2017 for the removal of trees, realignment of an existing creek, bulk earthworks, and the construction of a 4-storey mixed use development at Lot 101 DP1185867, Pioneer Drive, Oak Flats NSW 2529, subject to the conditions of consent set out in Annexure 'A'.

Catchwords:	DEVELOPMENT APPLICATION – conciliation conference – mixed use with childcare – flood management – height non-compliance – cl 4.6 variation – agreement between the parties – orders
Legislation Cited:	Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Regulation 2000 Land and Environment Court Act 1979 Shellharbour Local Environmental Plan 2013 State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 State Environmental Planning Policy No 55—Remediation of Land
Texts Cited:	Shellharbour Development Control Plan 2013
Category:	Principal judgment
Parties:	JV Co 8 Pty Ltd (Applicant) Shellharbour City Council (Respondent)
Representation:	Counsel: L Nurpuri (Applicant) Solicitors: William Roberts Lawyers (Applicant) M Harker, Lindsay Taylor Lawyers (Respondent)
File Number(s):	2018/158735
Publication restriction:	No

JUDGMENT

1 **COMMISSIONER**: This is an appeal against a deemed refusal by Shellharbour City Council (hereafter the Council) of Development Application (DA) 580/2017, which seeks removal of all trees, realignment of an existing creek with associated bulk

earthworks, and construction of a four (4) storey mixed use commercial development including a child care facility, on Lot 101 DP 1185867, located on the corner of Pioneer Drive and New Lake Entrance Road, Oak Flats (the Site).

2 The site is currently a vacant lot and will be known after grant of the consent as 10 Pioneer Drive, Oak Flats.

3 This Class 1 appeal is made under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act 1979).

4 The Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act 1979) between the parties, which was held on 12 June 2019. I presided over the conciliation conference. There were no objectors heard at this conciliation, although the Court acknowledges the one submission in objection following notification, whom raised concerns regarding traffic, is resolved to the parties' satisfaction.

5 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 is to uphold the appeal and grant consent to DA 580/2017 with conditions.

6 The respondent has sought and received consent from the Southern Regional Planning Panel to enter into this agreement.

7 Pursuant to s 34(3) of the LEC Act 1979, 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(1) of the EPA Act 1979 to grant consent to DA 580/2017 under appeal with conditions.

8 The parties identified the jurisdictional prerequisites of particular relevance in these proceedings, pursuant to s 4.15(1) of the EPA Act 1979, as consistency with: Environmental Planning and Assessment Regulation 2000 (EPA Reg); State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (SEPP Child Care); State Environmental Planning Policy No 55—Remediation of Land (SEPP Remediation); Shellharbour Local Environmental Plan 2013 (SLEP); and Shellharbour Development Control Plan 2013 (SDCP). The parties agree that the amended plans and conditions of consent relate to the merits of the proposal.

9 The parties agree that the site is currently under the ownership of Council, and that pursuant to cll 49 and 50 of the EPA Reg, written consent from the current land owner is attached to the DA under appeal. Further to this, the parties confirm that the works required for relocation of the (public) pedestrian pathway are not proposed on lands other than the site.

10 The parties agree that the requirements of the SEPP Child Care and SEPP Remediation are complied with based on the amended plans and conditions of consent, which are consistent with the relevant studies undertaken to support the DA.

11

The parties agree that the relevant provisions of the SLEP are addressed to their satisfaction by the supporting documents and plans to the DA under appeal. The parties have assessed that the proposed development does not contravene any development standards, except height and specifically resolves the contentions as follows:

(a) Clauses 2.1 and 2.3 - the site is located within a B4 Mixed Use zone. The proposed commercial development and child care facility is permissible in the zone, and is not inconsistent with the zone objectives.

(b) Clause 5.6 – the proposed architectural roof feature does not cause the height exceedance of the standard and there are no adverse shadows cast by this feature or amenity impacts.

(c) Clauses 6.3 and 6.4 – the proposed development is compatible with the flood hazard and stormwater management requirements, such that appropriate flood mitigation measures and water management will not adversely affect the existing flood/stormwater behaviour particularly onto neighbouring properties or result in unacceptable water quality impacts offsite. The proposed relocation and design of the drainage line is sufficient to handle stormwater runoff and high velocity flows. The Plan of Management is a condition in the consent to ensure emergency action in a flood event is consistent with the amended water cycle management study. To restrict public access to flooded areas and along the bund, a fence on the pedestrian ramp with vegetation along its crest is conditioned in the consent.

12 The parties explained that the western portion of the proposed development, does not comply with the maximum height standard (of 15 m), as required in cl 4.3 of the SLEP. Therefore, the parties agree that a cl 4.6 written request for variation of height is required for further consideration of the proposed development, pursuant to cl 4.6 of the SLEP, and that the Court must also be satisfied pursuant to grant consent to the DA.

13 The parties agree that a variation of the non-compliance with the height development standard in cl 4.3 of the SLEP is satisfied by the cl 4.6 written request that addresses the requirements for a cl 4.6 variation of the development standard.

14 The parties accept that the height non-compliance is in response to flood mitigation and the low lying nature of the land surface on the site relative to adjoining areas. The parties agree that the cl 4.6 written request describes the worst case scenario, which has a height non-compliance up to 2.65 m (a variance up to 31.3%), which relates to the roof structure.

15 It is agreed that on this basis, the cl 4.6 written request for standard variation addresses the requirement of cl 4.6(3) by explaining that there are sufficient environmental planning grounds to justify the breach, and that strict compliance would be both unreasonable and unnecessary for the proposed development on this site. The proposed development does not adversely affect the character of the local area and due to the recessed nature of the structure on the site, will not be a dominant feature as viewed from the main street frontage (Pioneer Drive) or result in loss of amenity, particularly overshadowing to adjoining properties. There are sufficient environmental

planning grounds, whereby the proposed development achieves the required setbacks and other development standards, and height non-compliance at both street frontages will not be dominant in the streetscape.

16 The proposed development is not inconsistent with the objectives of the zone (cl 2.3 for B4 zone) and the height standard (cl 4.3), as established in the SLEP. The proposed height exceedance is therefore reasonable and necessary, resulting in a height increase across a limited portion of the site that does not result in adverse impact to the proposed development, adjoining properties or the character of the local area. The proposed development is in the public interest.

17 I am therefore satisfied that the requirements of cl 4.6 of the SLEP have been addressed and that a variation in the height standard, pursuant to cl 4.3, is appropriate as proposed in the development.

18 The amended plans and conditions of consent address any potential bushfire risk, consistent with the bushfire assessment report, including a maintained vegetation setback to the road and fire retardant outdoor structures. The parties have confirmed that the site is not in a bushfire prone area.

19 Based on the amended plans and supporting documents to the DA, there are no contentions that relate to the controls as specified in the SDCP.

20 I am satisfied that there are no jurisdictional impediments to this agreement and that the DA, based on the amended plans as provided in the conditions of consent, satisfies the requirements of s 4.15(1) of the EPA Act 1979.

21 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 1979 to dispose of the proceedings in accordance with the parties' decision.

22 The Court orders:

(1) The Applicant is granted leave to amend development application DA0580/2017 to rely upon the following plans and documents:

(a) Part Site + Floor Plan, Ref. 16079, DA1.05H, dated 16 April 2019;

(b) Elevations, Ref. 16079, DA1.08D, dated 16 April 2019;

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(g) Written Request under Clause 4.6 Exceptions to Development Standards of Shellharbour Local Environmental Plan 2013: Lot 101 DP 1185867, No 11 Pioneer Drive, Oak Flats, dated April 2019;

(h) Development Application form dated 23 November 2017.

(2)

The parties agree that the amendments made to the development application are not minor for the purposes of section 8.15(3) of the *Environmental Planning & Assessment Act 1979*. The Applicant is to pay the Respondent's costs thrown away as a consequence of the amendments as agreed or assessed.

(3) The written request prepared by Michael Brown Planning Strategies, and dated April 2019, pursuant to cl 4.6 of the Shellharbour Local Environmental Plan 2013 (SLEP) in relation to cl 4.3 of the SLEP has been considered and the necessary state of satisfaction under cl 4.6(4) of the SLEP has been met. Consequently, the written request is well founded and upheld.

(4) The appeal is upheld.

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Sarah Bish

Commissioner of the Court

Annexure A (400 KB)

Plans (3.18 MB, pdf)

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Decision last updated: 28 June 2019