



Land and Environment Court  
New South Wales

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Case Name: Coles Group Property Developments Ltd v Sutherland Shire Council

Medium Neutral Citation: [2020] NSWLEC 1458

Hearing Date(s): Conciliation conference held on 19 and 21 August 2020

Date of Orders: 29 September 2020

Decision Date: 29 September 2020

Jurisdiction: Class 1

Before: Bish C

Decision: Refer to orders at [34]

Catchwords: DEVELOPMENT APPLICATION – mixed use development – amenity – flooding – traffic – liveable dwellings character and streetscape consistency – height and FSR standards non-compliance – cl 4.6 written variation requests – conciliation conference – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979  
Land and Environment Court Act 1979  
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004  
State Environmental Planning Policy (Infrastructure) 2007  
State Environmental Planning Policy No 55—Remediation of Land  
State Environmental Planning Policy No 64—Advertising and Signage  
State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development  
Sutherland Shire Local Environmental Plan 2015

Texts Cited: Apartment Design Guide  
Sutherland Shire Development Control Plan 2015

Category: Principal judgment

Parties: Coles Group Property Developments Ltd (Applicant)  
Sutherland Shire Council (Respondent)

Representation: Counsel:  
J Chenevier (Solicitor) (Applicant)  
R McCulloch (Solicitor) (Respondent)

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Norton Rose Fullbright Australia  
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File Number(s): 2019/404403

Publication Restriction: No

## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against the deemed refusal of Development Application (DA) 19/0333 by Sutherland Shire Council (hereafter the Council), which as amended, seeks the demolition of existing structures, tree removal and construction of a shop top housing development with parking, including a supermarket and other stores, a residential flat building for 120 apartments, relevant signage, associated civil infrastructure and landscaping on Lot B DP 449572, Lot X DP 396618, Lot D DP 387699, Lot A DP 449572 and Lot 26 to 29 DP 10068, also known as 41-47 and 51 President Avenue and 178-186 Willarong Road, Caringbah (hereafter the site).
- 2 This Class 1 appeal is made under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 3 The Court agreed to a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was initially held onsite on 19 August 2020 and subsequently adjourned to allow the parties to finalise their agreement. I presided over the conciliation conference. There were no objectors whom spoke at this conciliation.

- 4 Prior to and in response to the conciliation conference, following expert discussion, the applicant sought to amend the supporting plans and documents to the DA, which includes the cl 4.6 written requests seeking variation of development standards and contamination assessment report. Leave is granted by the Court to amend the DA under appeal and rely on these amended documents and plans, which is unopposed by the respondent.
- 5 Based on these amended plans, together with the DA's supporting documents 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 Court. The parties agree that the issues raised by the objectors have been considered and resolved. The decision of the parties is to uphold the appeal and grant consent to DA 19/0333 with conditions.
- 6 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(1) of the EPA Act and being satisfied, pursuant to s 4.15(1) to grant consent to DA 19/0333 with conditions, as described in Annexure A.
- 7 The parties identified the jurisdictional prerequisites of particular relevance to the Court to be satisfied to grant consent in these proceedings, pursuant to the requirements of s 4.15 of the EPA Act, as consistency with the: State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX); State Environmental Planning Policy (Infrastructure) 2007 (SEPP Infrastructure); State Environmental Planning Policy No 55—Remediation of Land (SEPP 55); State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65); State Environmental Planning Policy No 64—Advertising and Signage (SEPP 64); and Sutherland Shire Local Environmental Plan 2015 (SSLEP). In addition, the Sutherland Shire Development Control Plan 2015 (SSDCP) is of consideration to grant consent to the DA. The parties agree that they have undertaken and are satisfied with the relevant merit assessment.

- 8 In compliance with the requirements of SEPP 65, the DA is supported by amended plans and the conditions of consent, which address the relevant requirements for consideration. The proposed development provides appropriate design quality and has had regard to the requirements of SEPP 65 and the Apartment Design Guide (ADG). The parties agree that the requirements of the SEPP 65 are satisfied.
- 9 The parties agree that the requirements of SEPP 64 are addressed by the amended plans and documents that support the DA, together with the conditions of consent, which specifically addressed cl 3(1)(a) as contended.
- 10 The proposed development is required to comply with the provisions of the SEPP BASIX. A BASIX Certificate relevant to the proposed development is identified in the conditions of consent, in compliance with the SEPP BASIX provisions.
- 11 With regards to SEPP 55, the parties are satisfied that the proposed development complies with its requirements, and specifically with cl 7, which based on the contaminated site investigation, requires a Remedial Action Plan (RAP) which is provided relevant to the assessed risk, and described in the conditions of consent.
- 12 Due to the location of the site, the requirements of the SEPP Infrastructure are relevant for consideration. The parties agree that based on the amended documents that support the DA under appeal and conditions of consent, the contentions that specifically relate to cll 86, 101, 102 and 104 as contended are resolved.
- 13 The parties agree that the conditions provided by the relevant concurrence authorities as sought have been included in the conditions of consent in Annexure A.
- 14 The site is located within the B3 Commercial Core Zone, as described in the SSLEP. The proposed development is permissible in the zone. The parties agree that the relevant provisions of the SSLEP are addressed to their satisfaction by the supporting documents and amended plans to the DA under appeal. The parties agree that the objectives of the zone are satisfied and

relevant contentions are resolved based on the plans and documents supporting the amended DA.

- 15 The proposed development does however exceed the numeric requirements of cl 4.3 (height standard) and cl 4.4 (floor space ratio, FSR) of the SSLEP. All other relevant numeric development standards are satisfied.
- 16 It is accepted by the parties that a cl 4.6 written request for variation of the height and FSR standards is required to be considered by the Court to grant consent to the DA, pursuant to cl 4.6 of the SSLEP.
- 17 The written request for (height) variation explains that the height of the proposed development exceeds the two relevant height standards that are applicable across the site, being 30m in the northern portion and 20m in the southern portion of the site, as specified in cl 4.3 of the SSLEP.
- 18 Further to this, the proposed development exceeds the FSR standard established at 2.5:1 in cl 4.4 of the SSLEP, that applies to the southwest corner of the site. The FSR that applies to the remainder and majority of the site, is established at 3:1 in cl 4.4 of the SSLEP, and is not contravened.
- 19 The cl 4.6 (height) written request explains that the exceedance in the height standards do not result in a development that is out of character with the local area and is not perceived adversely from the streetscape. The proposed development responds to the requirements for flood mitigation by raising the floor levels.
- 20 The cl 4.6 (FSR) written request explains that the exceedance in FSR is limited to the north-eastern portion of the site, where the FSR is lower than is applicable across the remainder of the site, and results in a building that appropriately addresses the streetscape and is in character with the remainder of the site and local area.
- 21 According to the written requests, there are no adverse impacts from visual bulk, view loss, solar access or privacy as a result of the non-compliance with the development standards for the proposed development. The proposed development is not inconsistent with the zone objectives or the relevant

development standards. The portions of the non-compliant building forms are not readily discernible in the context of the site or are out of character.

- 22 The proposed development satisfies the objectives of the zone and the relevant development standards, for both height and FSR. As the proposed development is in character with the local area, results in no adverse amenity impacts and satisfies the relevant standard objectives, that compliance with the development standards would be both unreasonable and unnecessary.
- 23 The written requests consider that a variation of the height and FSR development standards, pursuant to cl 4.3 and 4.4, respectively of the SSLEP is therefore satisfied, and flexibility of the standards is justified.
- 24 Having reviewed the (cl 4.6) written requests, I agree that the written requests for variation of the height and FSR standards individually address the requirements of cl 4.6(3) of the SSLEP by describing sufficient environmental planning grounds to justify the development standard exceedance, and that strict compliance would be both unreasonable and unnecessary for the proposed development on this site. Therefore, cl 4.6(4)(a)(i) of the SSLEP is satisfied to vary the height and FSR development standards, as requested.
- 25 The proposed development, as described to the Court, is consistent with the objectives of the zone (cl 2.3 for B3 commercial core zone), and the height (cl 4.3) and FSR (cl 4.4) standards, as established in the SSLEP.
- 26 The proposed non-compliances of the standards do not result in adverse impact to the residents of the proposed development, adjoining properties or the character of the local area. The proposed development is therefore in the public interest, satisfying cl 4.6(4)(a)(ii).
- 27 I accept the cl 4.6's written explanation that there is no significant consequence to State or Regional environmental planning matters as a result of varying the development standards in this instance. Therefore, variation of the height and FSR development standards is not inconsistent with cl 4.6(4)(b) or (5) of the EPA Act.

- 28 I am satisfied that the requirements of cl 4.6 of the SSLEP have been addressed and that a variation in the height and FSR standards, as established in cl 4.3 and 4.4, respectively, should be granted.
- 29 Based on the amended plans and supporting documents to the DA, the contentions that relate to the controls as specified in the SSDCP are achieved to the satisfaction of the parties. The parties agree that the amended plans address any potential amenity impacts, and streetscape/character compatibility that would warrant refusal of the DA.
- 30 The parties agree that the requirements of the SSDCP are complied with, based on the amended plans, supporting documents to the DA and conditions of consent. The proposed development was publicly notified in accordance with the SSDCP. During the initial notification period, six submissions were received by Council, which have been considered in the making of this agreement.
- 31 Based on the amended plans and supporting documents to the DA including (cl 4.6) written requests for variation of the height and FSR development standards, the contentions as expressed in the Statement of Facts and Contentions are explained to the Court as resolved to the satisfaction of the parties.
- 32 I am satisfied that there are no jurisdictional impediments to this agreement and that DA 19/0333 should be granted, as it satisfies the requirements of s 4.15(1) of the EPA Act.
- 33 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.
- 34 The Court orders that:
- (1) The Applicant is granted leave to amend the development application and rely on amended plans in Condition 1 at Annexure A.
  - (2) Pursuant to section 8.15(3) of the *Environmental Planning and Assessment Act 1979*, the Applicant is to pay those costs of the Respondent that were thrown away as a result of amending the application for development consent in the agreed sum of \$20,000 by 2 October 2020.

- (3) The Applicant's cl 4.6 written request seeking to vary the height of buildings development standard under clause 4.3 of Sutherland Shire Local Environmental Plan 2015, in relation to the 30m height control applying to the northern part of the site is upheld.
- (4) The Applicant's cl 4.6 written request seeking to vary the height of buildings development standard under clause 4.3 of Sutherland Shire Local Environmental Plan 2015, in relation to the 20m height control applying to the southern part of the site is upheld.
- (5) The Applicant's cl 4.6 written request seeking to vary the floor space ratio development standard under clause 4.4 of Sutherland Shire Local Environmental Plan 2015, in relation to the 2.5:1 standard applying to the southwest corner of the site is upheld.
- (6) The appeal is upheld.
- (7) Development Application DA 19/0333 for demolition of existing structures; tree removal; construction of a shop top housing development containing a supermarket, liquor store, specialty stores, 120 residential apartments, undercroft and basement car parking; internal fitout and use of the supermarket and liquor store; advertising signs and signage zones; and associated civil infrastructure, public domain and landscape works at 41-47 and 51 President Avenue, and 178-186 Willarong Road, Caringbah NSW 2229, is approved subject to the conditions at Annexure A.

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**Sarah Bish**

**Commissioner of the Court**

[Annexure A \(412043, pdf\)](#)

[Plans \(30214180, pdf\)](#)

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