



Land and Environment Court
New South Wales

Case Name: The Heran Building Group Pty Ltd v Tweed Shire Council

Medium Neutral Citation: [2024] NSWLEC 1490

Hearing Date(s): Conciliation on 7 August 2024

Date of Orders: 14 August 2024

Decision Date: 14 August 2024

Jurisdiction: Class 1

Before: Gray C

Decision: The Court orders that:
(1) The appeal is upheld.
(2) The Applicant's written request under clause 4.6 of the Tweed City Centre Local Environmental Plan 2012 (the TCC LEP) seeking a contravention of the development standard for height of buildings set out in clause 4.3(2) of the TCC LEP is upheld.
(3) Development application DA22/0515 for a residential flat building at 13-19 Enid Street, Tweed Heads (Lots 8, 9, 10, 11 in DP224382) is determined by the grant of consent, subject to the conditions set out in Annexure A.
(4) The Applicant is to pay those costs of the Respondent thrown away as a result of the amendment of the application for development consent referred to in [11(1)] as agreed or assessed in accordance with section 8.15(3) of the Environmental Planning and Assessment Act 1979.

Catchwords: APPEAL – development application – residential flat building – breach of height development standard – conciliation conference – agreement reached – orders made

Legislation Cited:	<p>Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 4.20, 8.7, 8.15</p> <p>Land and Environment Court Act 1979, s 34</p> <p>Water Management Act 2000, s 90</p> <p>Environmental Planning and Assessment Regulation 2021, ss 27, 29, 37, 38</p> <p>State Environmental Planning Policy (Biodiversity and Conservation) 2021, Ch 4, s 4.8</p> <p>State Environmental Planning Policy (Housing) 2021, Ch 4, Sch 7A s 8(2A), s 147</p> <p>State Environmental Planning Policy (Resilience and Hazards) 2021, ss 2.10, 2.12, 2.13, 4.6</p> <p>State Environmental Planning Policy (Transport and Infrastructure) 2021. s 2.48</p> <p>Tweed City Centre Local Environmental Plan 2012, cll 4.3, 4.4, 4.6, 6.1, 6.6, 6.9, 6.10</p>
Texts Cited:	<p>Tweed Coast Comprehensive Koala Plan of Management 2020</p> <p>Tweed Coastline Management Plan (Tweed Shire Council, 2005)</p>
Category:	Principal judgment
Parties:	<p>The Heran Building Group Pty Ltd (Applicant)</p> <p>Tweed Shire Council (Respondent)</p>
Representation:	<p>Counsel:</p> <p>I Hemmings SC (Applicant)</p> <p>A Pickles SC (Respondent)</p> <p>Solicitors:</p> <p>Mills Oakley Law Firm (Applicant)</p> <p>Lindsay Taylor Lawyers (Respondent)</p>
File Number(s):	2023/68797
Publication Restriction:	Nil

JUDGMENT

- 1 **COMMISSIONER:** On the edge of the central business district of Tweed Heads, not far from the border with Queensland, the applicant seeks development consent for the construction of a residential flat building at 13-19

Enid Street, Tweed Heads. A development application was lodged on 4 August 2022, and was refused by the Northern Regional Planning Panel on 5 July 2023. These proceedings are an appeal against that decision. The appeal is lodged pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act). In exercising the functions of the consent authority on the appeal, the Court has the power to determine the development application pursuant to ss 4.15 and 4.16 of the EPA Act. The final orders in this appeal, outlined in [12] below, are made as a result of an agreement between the parties that was reached at a conciliation conference.

- 2 The development application has been the subject of a number of amendments, and the development now proposed is for the construction of two residential towers, each with 14-storeys inclusive of a 3 or 4-storey podium. Whilst the development application, as lodged, proposed a built form of 11 storeys that complied with the height development standard, feedback from the respondent and its design review process were for the development to be designed to deliver taller, more slender buildings to achieve the built form and scale intended for the City Centre Core Precinct in which the site is located, as well as to facilitate retention of view corridors and access to light and ventilation.
- 3 The development is proposed to be constructed over two stages. Stage 1 comprises the construction of the north tower of 66 apartments, as well as the construction of the basement levels across the whole development site, vehicular access, the communal open space and pool, and landscaping including temporary landscaping. Stage 2 is the construction of the south tower, with the remaining 56 apartments.
- 4 Following an adjournment of the hearing of the appeal, the Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 7 August 2024. I presided over the conciliation conference.
- 5 At the conciliation conference, an agreement under s 34(3) of the LEC Act was reached between the parties as to the terms of a decision in the proceedings that was acceptable to the parties. The signed agreement was provided the

same date, and follows the Council's approval of an application for an amendment to a development application pursuant to ss 37 and 38 of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation 2021). The amendments make design changes to allow the upper two levels to better integrate with the design of the towers, by continuing the vertical indentation from the podium to the top floor of each tower, removing the two tone colour to the upper two levels, reducing the top floor solid to void ratio, and integrating the lift overrun on the southern tower into the amended façade recess. The amendments also include changes to the floor layout of a number of units, the removal of screening from the south elevation, changes to the design of balustrades and louvres, and landscaping changes including amending the interface between the apartments and the ground floor open space.

- 6 The decision agreed upon is for the grant of development consent subject to conditions of consent pursuant to s 4.16(1) of the EPA Act. The signed agreement is supported by a Note on Jurisdiction that sets out the matters that the Court must consider prior to the grant of development consent. I have considered the contents of the Note, together with the documents referred to therein, the Class 1 Application and its attachments, the joint reports filed in the proceedings, the Council's bundle of documents filed in the proceedings, the assessment report dated 28 June 2023, and the documents that are referred to in condition 1. Based on those documents, I have considered the matters required to be considered pursuant to s 4.15(1) of the EPA Act.
- 7 As the presiding Commissioner, I am satisfied that the decision to grant development consent to the amended application subject to conditions of consent is a decision that the Court can make in the proper exercise of its functions (this being the test applied by s 34(3) of the LEC Act). I formed this state of satisfaction as each of the jurisdictional preconditions identified by the parties is met, for the following reasons:
 - (1) The development application is made with the written consent of the owner of the site.
 - (2) The development works are for the purposes of a residential flat building, which is an innominate permissible use in the R3 Medium

Density Residential zone in which the site is located, pursuant to the Tweed City Centre Local Environmental Plan 2012 (TCC LEP).

- (3) I am satisfied that consent should be granted notwithstanding the contravention of the height development standard. The development standard establishes a maximum height of RL 49.5, pursuant to cl 4.3 of the TCC LEP. The proposed maximum height of RL 52.5 represents a contravention of 3m above the numerical standard, or 6.06%. This contravention arises from the roof stair egress, with a smaller exceedance by the roof parapet line which is 0.8m above the height development standard across the two towers. I am satisfied that:
- (a) The written request dated 30 July 2024, lodged pursuant to cl 4.6 of the TCC LEP, adequately establishes sufficient environmental planning grounds that justify the breach in the height development standard by demonstrating that the breach allows the development to achieve consistency with the scale of the building sought by the Council in the City Centre Core Precinct, including the desired built form outcome of 14-storey towers. The breach also facilitates an arrangement of floor space on the site in a manner that allows for large setbacks and building separation, redistributing floor space from lower levels of the building (where there are large setbacks, areas for landscaping and a podium) to provide a superior urban design, separation distance and landscaped outcome.
 - (b) The written request demonstrates that compliance with the standard is unreasonable and unnecessary given that the proposal achieves the objectives of the standard notwithstanding the non-compliance.
 - (c) Based on the content of the written request and the town planning joint report filed 1 August 2024, the proposal is in the public interest because it is consistent with the objectives of the zone and of the standard.
- (4) The proposed development complies with the applicable development standard for floor space ratio in cl 4.4 of the TCC LEP, and with the minimum building street frontage in cl 6.6(2) the TCC LEP.
- (5) The site is mapped as having Class 5 Acid Sulfate Soils and is within 500m of adjacent land mapped as Class 4, part of which is below 5m Australian Height Datum (AHD). As such, cl 6.1 of the TCC LEP applies. Consistent with the requirements of cl 6.1(3), an acid sulfate soils management plan has been prepared for the proposed development and I am satisfied that any disturbance of acid sulfate soils will be managed to minimise adverse impacts.
- (6) The proposed development will penetrate the Limitation or Operations Surface of the Gold Coast Airport, and cl 6.9 of the TCC LEP applies. The development application was referred to Gold Coast Airport, as required by cl 6.9(2), who responded on 12 August 2022 without an objection to its construction, but requiring that a condition be attached to

the consent that approval be obtained from the Gold Coast Airport before construction commences.

- (7) Clause 6.10 of the TCC LEP concerns design excellence and applies to the proposed development. Based on the design verification statement dated 30 July 2024, the architectural plans referred to in condition 1 of the Annexure A, and the joint report of the town planners filed 1 August 2024, I have had regard to the matters in cl 6.10(3) and I consider that the design exhibits design excellence in accordance with cl 6.10(2). A competitive design process is not required as, consistent with cl 6.10(5), the consent authority certified that a competitive design process is not required, a design review panel has reviewed the development, and I have taken into account the advice of the design review panel dated 19 July 2024.
- (8) Consideration has been given as to whether the subject site is contaminated as required by s 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP RH), and I have considered a report specifying the findings of an investigation of the land concerned in the Detailed Site Investigation prepared by Range Environmental Consultants dated 19 April 2023 and updated 30 August 2023. The report confirms that the site is able to be remediated in accordance with a Remedial Action Plan dated 30 August 2023 and, therefore, will be made suitable for the proposed development.
- (9) The site is within the coastal environment area, such that s 2.10 of the SEPP RH applies. Based on the location of the site, the Remedial Action Plan date 30 August 2023, the acid sulfate soils report dated 2 August 2024 and the engineering services report dated 31 May 2024, I have considered the matters in s 2.10(1) and, consistent with ss 2.10(2)(a), I am satisfied that the development will not have any adverse impacts on the matters set out in s 2.10(1) of the SEPP RH. Based on those same matters, I am satisfied that the proposed development is not likely to cause increased risk of coastal hazards on that land or other land, consistent with s 2.12 of the SEPP RH. Further, with the information in the email received from the parties on 8 August 2024, I have considered the provisions of the Tweed Coastline Management Plan that are relevant for the purpose of s 2.13 of the SEPP RH.
- (10) Chapter 4 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP BC), which concerns koala habitat protection, applies to the site. As there is no vegetation clearing proposed in the development, the determination to grant development consent is consistent with the approved koala plan of management that applies to the site, which is the Tweed Coast Comprehensive Koala Plan of Management, as required by s 4.8.
- (11) Consistent with the requirements of s 27 of the EPA Regulation 2021, the amended development application is accompanied by the BASIX certificate dated 6 August 2024.

- (12) The amended development application is accompanied by a statement of a qualified designer dated 30 July 2024 that verifies the design of the development (the Design Statement), as required by s 29 of the EPA Regulation 2021.
 - (13) Chapter 4 of the State Environmental Planning Policy (Housing) 2021 (SEPP Housing) applies to the proposed development, pursuant to s 8(2A) of Sch 7A. Based on the Design Statement and the letter of the design review panel dated 19 July 2024, I have considered the matters required to be considered by s 147(1) of the SEPP Housing.
 - (14) The proposed development could affect an electricity power line or an electricity distribution pole, as a result of which s 2.48 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 requires notification to the electricity supply authority and consideration of their response. Consistent with those requirements, Essential Energy was notified of the development application and I have considered the content of their responses dated 12 October 2022, 11 January 2023 and 3 April 2024.
 - (15) The development application, in its original form, was notified between 31 August 2022 and 28 September 2022. Thirteen written submissions were received, and an oral submission was made at the site inspection on 6 August 2024. I have considered the issues raised in those submissions. In relation to view loss, I note that the view loss results from development that is anticipated by the relevant controls (and not from the exceedance discussed above), which provide for a height development standard of RL49.5 for the street blocks bounded by Enid Street, Bay Street, Frances Street and Wharf Street.
- 8 The proposal is integrated development pursuant to s 90 of the *Water Management Act 2000*. Water NSW has provided general terms of approval on 31 May 2024 under s 90 of the Water Management Act, and those terms of approval are incorporated into the conditions.
 - 9 Having reached the state of satisfaction that the decision is one that the Court could make in the exercise of its functions, s 34(3)(a) of the LEC Act requires me to “dispose of the proceedings in accordance with the decision”. The LEC Act also requires me to “set out in writing the terms of the decision” (s 34(3)(b)).
 - 10 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, any assessment of the merits of the development application against the discretionary matters that arise pursuant to an assessment under s 4.15 of the EPA Act.
 - 11 The Court notes that:

(1) That pursuant to section 37(1) of the Environmental Planning and Assessment Regulation 2021 (the EPA Regulation 2021) the Applicant applied to the Respondent consent authority for an amendment to Development Application No DA22/0515 (the Development Application), in the following respects (the amended application):

(a) the inclusion of architectural drawings prepared by Jackson Teece in replacement of corresponding earlier drawings as follows:

Drawing No.	Rev.	Title	Date
DA-000	12	Cover Sheet	30 July 2024
DA-010	7	Site Context	28 May 2024
DA-100	7	Site Plan	30 July 2024
DA-101	7	Site Plan – Staging	30 July 2024
DA-107	6	Floor Plan – Basement 3	28 May 2024
DA-108	8	Floor Plan – Basement 2	28 May 2024
DA-109	12	Floor Plan – Basement 1	28 May

			2024
DA-110	16	Floor Plan – Level 01 (Ground Floor)	30 July 2024
DA-111	12	Level 02_North Level 02_South	30 July 2024
DA-112	11	Level 03-04_North Typical Level 03_South	30 July 2024
DA-113	11	Level 03-04_North Typical Level 04_South	30 July 2024
DA-114	11	Level 05_North Level 05_South	30 July 2024
DA-115	11	Level 06-13_North Typical Level 06-13_South Typical	30 July 2024
DA-124	8	Level 14_North & South Penthouse	30 July 2024
DA-125	12	Roof Plan	30 July 2024
DA-200	8	Street Elevation	30

			July 2024
DA-201	12	Elevations – 01	30 July 2024
DA-202	11	Elevations – 02	30 July 2024
DA-300	10	Sections – 01	30 July 2024
DA-301	10	Sections – 02	30 July 2024
DA-302	4	Sections – 03 Lobby Cranked Sections	30 July 2024
DA-303	4	Sketches – LG Detail Sketch Sections	30 July 2024
DA-400	10	Enid Street Detail View 01	30 July 2024
DA-401	9	Enid Street Detail View 02	30 July 2024

DA-402	8	Enid Street Detail View 03	30 July 2024
DA-403	8	Enid Street Detail View 04	30 July 2024
DA-404	8	Enid Street Detail View 05	30 July 2024
DA-405	7	Enid Street View 01 Artist Illustration	30 July 2024
DA-406	6	Enid Street View 02 Artist Illustration	30 July 2024
DA-601	9	GFA Area Plans	30 July 2024
DA-601.1	2	GFA Area Plans	30 July 2024
DA-602	9	Deep Soil, Sitecover & Impermeable Surface Breakdown	30 July 2024
DA-603	8	Useable Communal Open Space (COS) Breakdown	30 July

			2024
DA-604	6	Shadow Analysis – COS	30 July 2024
DA-650	11	Apartment Yield/Mix & Typology	30 July 2024
DA-651	8	Storage Breakdown	30 July 2024
DA-652	7	Typical Apt North	30 July 2024
DA-653	7	Typical Apt North Cont.	30 July 2024
DA-654	7	Typical Apt South	30 July 2024
DA-655	4	Typical Apt South_Cont	30 July 2024
DA-660	4	Adaptable Apartment Layout	30 July 2024
DA-700	8	ADG Compliance	30

			July 2024
DA-701	8	ADG Compliance – Solar/Cross Ventilation	30 July 2024
DA-702	8	ADG Compliance – Solar/Cross Ventilation	30 July 2024
DA-800	8	Shadow Diagrams Sheet 1	30 July 2024
DA-801	8	Shadow Diagrams Sheet 2	30 July 2024
DA-802	3	Shadow Diagrams Sheet 3	30 July 2024
DA-850	8	Sun Analysis Sheet 1 – 09.00AM- 10.30AM	30 July 2024
DA-851	8	Sun Analysis Sheet 2 – 11.00AM- 12.30PM	30 July 2024
DA-852	8	Sun Analysis Sheet 3 – 1.00PM- 02.30PM	30 July 2024

DA-853	8	Sun Analysis Sheet 4 – 03.00PM	30 July 2024
DA-855	8	Building Height Planes Diagram	30 July 2024
DA-856	4	Building Height Breach Diagram	30 July 2024
DA-858	7	Significant Views	30 July 2024
DA-900	7	Staging – Site Plan	30 July 2024
DA-901	3	Staging – Site Plan	30 July 2024
DA-902	2	Staging – Floor Plan – Basement 3	28 May 2024
DA-903	2	Staging – Floor Plan – Basement 2	28 May 2024
DA-904	2	Staging – Floor Plan – Basement 1	28 May

			2024
DA-905	3	Staging – Floor Plan – Level 01 (Ground Floor)	30 July 2024
DA-906	3	Staging Elevation	30 July 2024

- (b) the inclusion of the schedule of amendments prepared by Jackson Teece dated 30 July 2024;
 - (c) the inclusion of a further amended clause 4.6 variation request, for height of buildings, prepared by Zone Planning NSW dated 30 July 2024, in replacement of earlier clause 4.6 variation request;
 - (d) the inclusion of the amended document titled 'Landscape Intent' prepared by Zone Landscape dated 30 July 2024 in replacement of the earlier corresponding document;
 - (e) the inclusion of the amended acid sulfate soils report (version 6) prepared by Pacific Geotech dated August 2024 in replacement of the earlier acid sulfate soils report;
 - (f) the inclusion of the revised design verification statement prepared by Jackson Teece in replacement of the earlier design verification statement; and
 - (g) the inclusion of the revised BASIX certificate in replacement of the earlier BASIX certificate.
- (2) That pursuant to section 38(1) of the EPA Regulation 2021 the respondent consent authority has approved the application to amend the development application.
- (3) That the Respondent will register the development consent on the NSW Planning Portal in accordance with section 4.20(1) of the *Environmental Planning and Assessment Act 1979* within 14 days of the date of determination.

Orders

12 The Court orders that:

- (1) The appeal is upheld.
- (2) The Applicant's written request under clause 4.6 of the Tweed City Centre Local Environmental Plan 2012 (the TCC LEP) seeking a

contravention of the development standard for height of buildings set out in clause 4.3(2) of the TCC LEP is upheld.

- (3) Development application DA22/0515 for a residential flat building at 13-19 Enid Street, Tweed Heads (Lots 8, 9, 10, 11 in DP224382) is determined by the grant of consent, subject to the conditions set out in Annexure A.
- (4) The Applicant is to pay those costs of the Respondent thrown away as a result of the amendment of the application for development consent referred to in [11(1)] above as agreed or assessed in accordance with section 8.15(3) of the *Environmental Planning and Assessment Act 1979*.

J Gray

Commissioner of the Court

68797.23 (Annexure A)

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