



Land and Environment Court
New South Wales

Case Name: Jennifer Street Developments Pty Ltd v Randwick City Council

Medium Neutral Citation: [2023] NSWLEC 1554

Hearing Date(s): Conciliation conferences on 9 June, 7 and 21 July, 7 and 23 August 2023

Date of Orders: 22 September 2023

Decision Date: 22 September 2023

Jurisdiction: Class 1

Before: Porter C

Decision: The Court orders:

- (1) Pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979, the Applicant is to pay the Respondent's costs thrown away as a result of amendment of the development application in a sum of \$6,000.00.
- (2) The Applicant's written request under cl 4.6 of the Randwick Local Environmental Plan 2012 (RLEP) prepared by Planning Ingenuity dated 9 November 2022 seeking to vary the height in cl 4.3 of the RLEP is upheld.
- (3) The appeal is upheld.
- (4) Development consent is granted to development application No DA/580/2022 for a stage 2 construction of 3 x part 3 to part 4-storey residential flat buildings with 75 apartments, common basement level car parking for 117 cars, the partial removal of onsite vegetation and replacement landscaping at 11 Jennifer Street, Little Bay subject to the conditions of consent at Annexure A. The development also comprises the retention of Eastern Suburbs Banksia Scrub vegetation

within the southern portion of the site.

Catchwords:	DEVELOPMENT APPLICATION – Stage 2 residential flat buildings – cl. 4.6 written request – height variation - conciliation conference – agreement between the parties - orders
Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 4.16, 4.24, 8.7, 8.15 Environmental Planning and Assessment Regulation 2021, s 29, 38 Land and Environment Court Act 1979, s 34 Randwick Local Environmental Plan 2012 cll 2.3, 2.7, 4.3, 4.4, 4.6, 5.10, 6.2, 6.4, 6.5, 6.10, 6.11, 6.12 State Environmental Planning Policy (Biodiversity and Conservation) 2021 State Environmental Planning Policy (Building Sustainability Index: Basix) 2004 State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6 State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development, cll 4, 28, 30
Cases Cited:	Auspat International No.2 Pty Ltd v Randwick City Council [2022] NSWLEC 1567 Karimbla Properties (No.59) Pty Limited v City of Parramatta [2023] NSLEC 1365
Texts Cited:	Apartment Design Guide
Category:	Principal judgment
Parties:	Jennifer Street Pty Ltd (Applicant) Randwick Council (Respondent)
Representation:	Counsel: J Strati (Solicitor) (Applicant) V McGrath (Solicitor) (Respondent) Solicitors: Urban Property Group (Applicant) Randwick City Council (Respondent)
File Number(s):	2023/2060

JUDGMENT

- 1 **COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) being an appeal against the deemed refusal of development application DA/580/2022 for stage 2 construction of three x part three, part four storey residential flat buildings with 75 apartments, common basement level car parking for 117 cars, the partial removal of onsite vegetation and replacement landscaping (application) at 11 Jennifer Street, Little Bay, legally described as Lot 11 in DP 1237484 (site). The development also comprises the retention of Eastern Suburbs Banksia Scrub (ESBS) vegetation within the southern portion of the site.
- 2 The Court arranged a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 9 June 2023. I have presided over the conciliation conference.
- 3 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 for the amended application and granting development consent to the amended application, subject to amended plans and other documents being prepared for which I granted an adjournment.
- 4 Further information and amended plans were filed with the Court on 23 August 2023, as was a signed agreement prepared in accordance with s 34(10) of the LEC Act, in which the Respondent, as the relevant consent authority, agreed under s 38 of the Environmental Planning and Assessment Regulation 2021 (EPA Reg) to the Applicant amending Development Application No DA/580/2022 in accordance with the documents listed at [39] (amended application). The key amendments are in relation to building articulation, presentation and access to Jennifer Street, apartment layouts, landscaping, stormwater, substation location and provision of further information.

- 5 Accompanying the filed s 34 agreement, the parties have submitted a jurisdictional statement setting out how the proposal has satisfied the jurisdictional requirements and other matters.
- 6 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 one that the Court could have made in the proper exercise of its functions.
- 7 The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application, subject to conditions of consent.

Jurisdictional Prerequisites

- 8 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 and explained how the jurisdictional prerequisites have been satisfied. 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, as set out below.
- 9 I am satisfied that owners consent accompanied the development application.
- 10 The application was lodged to the Respondent on 15 November 2022. The Respondent notified the development application between 24 November 2022 to 8 December 2022. Five unique submissions were received, which have been considered by the consent authority.
- 11 A concept development application DA/698/2020 was granted consent by the Court in *Auspat International No.2 Pty Ltd v Randwick City Council [2022] NSWLEC 1567* (concept approval). The proposed development is stage 2 of that concept approval, though I note references to 'stage 1' within the concept approval are to be read as references to this application.
- 12 Section 4.24(2) of the EPA Act requires that any further development application cannot be inconsistent with the concept approval. The parties agree and I accept on the basis of the approved plans and conditions of consent within concept approval DA/698/2020, that the amended application is

consistent with the concept approval, its design principles and conditions of consent.

Randwick Local Environmental Plan 2012 (RLEP)

13 The subject site is zoned R3 Medium Density Residential pursuant to the Randwick Local Environmental Plan 2012 (RLEP), where the proposed development is permissible with consent. Pursuant to cl 2.3, I have had regard to the objectives of the zone:

- To provide for the housing needs of the community within a medium density residential environment.
- To provide a variety of housing types within a medium density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To recognise the desirable elements of the existing streetscape and built form or, in precincts undergoing transition, that contribute to the desired future character of the area.
- To protect the amenity of residents.
- To encourage housing affordability.
- To enable small-scale business uses in existing commercial buildings.

14 Demolition requires consent pursuant to cl 2.7 of the RLEP, which forms part of the amended application.

15 Clause 4.3 Height of buildings of the RLEP applies, which allows a maximum height of 9.5m. The amended application exceeds the height limit, with an overall height of the southern building at 14.85m (a breach of 5.35m or 56.3%) and an overall height of the northern building at 14.65m (5.15m or 54.2%). The breaches relate to part of the buildings and lift overruns.

16 The parties agree and I acknowledge Commissioner O'Neill's decision of *Karimbla Properties (No.59) Pty Limited v City of Parramatta* [2023] NSLEC 1365. At [48] – [50], a cl 4.6 written request was found to not be required for a subsequent development application that was consistent with the concept approval through the operation of s 4.24(2) of the EPA Act.

17 For the abundance of caution, the application is also supported by a cl 4.6 written request authored by Planning Ingenuity dated 9 November 2022 (written request). The parties agree, and I am satisfied, that the written request

justifies the contravention and that the proposed development is in the public interest for the following reasons:

- The written request demonstrates that compliance with the height development standard is unreasonable or unnecessary in the circumstances of this case. The written request demonstrates that the objectives for height are achieved notwithstanding the contravention as:
- The breach is compatible with the desired mixed future character of the area;
- The breach is compatible with the adjoining heritage conservation areas;
- The development maximises landscaping areas and decreased site coverage to conserve the ESBS Endangered Ecological Community, which has created the breach by pushing the building higher; and
- The breach is consistent with the objective to not adversely impact on neighbouring properties with respect to visual bulk, privacy, overshadowing and views, as these impacts are from the compliant built form and not the breaches.
- The written request demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard as the contravention is consistent with the concept approval and is in response to the reduced site coverage to conserve the ESBS Endangered Ecological Community, resulting in a higher building.
- The contravention from the proposed development will be in the public interest as it is consistent with the objectives of the height development standard and I also consider that the proposed development is consistent with the zone objectives.
- In accordance with 4.6(5), I have considered the provisions and am satisfied that the contravention will not infringe on those matters.

18 Accordingly, I am satisfied that the written request and proposed contravention to the height development standard is adequately justified in accordance with the matters set out in cl 4.6 of the RLEP.

19 As such, the Applicant's written request, pursuant to cl 4.6 of the RLEP, seeking to vary the development standard for height of buildings as set out at cl 4.3 of the RLEP, is upheld.

20 Clause 4.4 Floor Space Ratio (FSR) of the RLEP applies, which allows a maximum FSR of 0.75:1. The parties agree and I am satisfied, on the basis of the Statement of Environmental Effects prepared by Planning Ingenuity dated 9 November 2022 (SEE) and the Architectural Plans prepared by Hill Thalys

dated 8 August 2023, that the amended development application complies with the FSR, with an FSR of 0.7:1.

- 21 Clause 5.10 Heritage Conservation of the RLEP applies to the site as it adjoins the Kamay Botany Bay National Park Conservation Area and the Prince Henry Hospital Conservation Area, both listed on the State Heritage Register. The application is accompanied by a Heritage Impact Statement prepared by Weir Philipps Heritage and Planning dated November 2022 (HIS). I have considered the HIS and SEE and accept the parties agreed evidence that the provisions of cl 5.10 of the RLEP have been adequately addressed, including appropriate conditions of consent at Annexure A.
- 22 Clause 6.2 Earthworks of the RLEP applies to the proposed development. I have considered the provisions of cl 6.2, the SEE, the Geotechnical Report prepared by SMEC Testing Services Pty Ltd dated May 2021 and the conditions of consent at Annexure A. I agree with the parties that the requirements of cl 6.2 Earthworks have been met.
- 23 Clause 6.4 Stormwater management applies to the site. The parties agree and I am satisfied that the provisions of cl 6.4 are met with consideration of the stormwater management plan prepared by Enscape Studio dated November 2022 and stormwater plans at Annexure A.
- 24 Clause 6.5 Terrestrial biodiversity applies to the site. I have considered the Ecological Letter dated 4 April 2023, Biodiversity Development Assessment Report dated 3 June 2022, and Bushfire Management Plan dated 26 April 2022, all authored by Keystone Ecological. I agree with the parties that the provisions of cl 6.5 have been satisfied.
- 25 Clause 6.10 Essential services applies to the site. The parties agree and I am satisfied with consideration of the documentation and conditions of consent at Annexure A that the provisions have been met.
- 26 Clause 6.11 Design excellence applies to the proposed development. I have had regard to the SEE, amended design verification statement (DVS) and SEPP 65 Design Quality Statement completed by registered architect Mr Philip

Thalis and agree with the parties that the provisions of cl 6.11 have been adequately addressed.

- 27 Clause 6.12 requires the preparation of a development control plan and applies to the site. The parties agree and I accept that the concept approval satisfies this requirement in accordance with s 4.24 of the EPA Act.

State Environmental Planning Policy (Biodiversity and Conservation) 2021

- 28 The site contains ESBS, an identified critically endangered ecological community in the Sydney Basin Bioregion.
- 29 The site accommodates two threatened fauna species, the Little Bent-winged Bat and Large Bent-winged Bat.
- 30 I note that the concept approval dealt with the jurisdictional requirements of State Environmental Planning Policy (Biodiversity and Conservation) 2021. The parties agree and I accept that the amended application is consistent with the concept approval, and I am satisfied that appropriate conditions of consent have incorporated the relevant technical reports, including the Biodiversity Development Assessment Report dated 3 June 2022, Bushland Management Plan dated 26 May 2022, and Ecological Letter dated 4 April 2023 all prepared by Keystone Ecological. The conditions of consent at Annexure A also provide for the biodiversity offset credits and protection of the ESBS within the nominated conservation area.

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

- 31 The parties agree and I am satisfied that the proposed development is accompanied by a BASIX Certificate that meets the provisions of the State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.

State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development

- 32 State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment (SEPP 65) Development applies to the proposed development in accordance with cl 4.

- 33 Clause 28 requires consideration of the design quality of the development in accordance with the design quality principles within Sch 1 and the Apartment Design Guide (ADG). Clause 30(2) requires that adequate regard must be had to the same provisions. Relevantly, s 29 of the EPA Reg requires that residential apartment development must be accompanied by a DVS by a qualified designer in relation to the design quality principles within Sch 1 of SEPP 65 and the ADG.
- 34 I have considered the amended DVS and SEPP 65 Design Quality Statement completed by the nominated qualified designer Mr Philip Thalys (registered architect No 6780) and I am satisfied that the proposed development has adequately considered the design quality principles and ADG.

State Environmental Planning Policy (Resilience and Hazards) 2021

- 35 The provisions of s 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience and Hazards) apply to the site. The proposed development is accompanied by a Detailed Site Investigation report (DSI) dated 2 December 2022 prepared by EI Australia Pty Ltd. The DSI concludes that the site contained very little contamination and the site can be made suitable for the proposed development based on the implementation of measures outlined within the report. The DSI has been included as a condition of consent in addition to other suitable remediation conditions (in particular, condition 41). Accordingly, the parties agree and I am satisfied that the provisions of s 4.6 of SEPP Resilience and Hazards have been adequately addressed.

Conclusion

- 36 In making the orders to give effect to the agreement between the parties, I was not required to, and have not, made any merit assessment of the issues that were originally in dispute between the parties.
- 37 I have considered the jurisdictional prerequisites and I am satisfied on the basis of the evidence before me that the agreement of the parties is a decision that the Court could have made in the proper exercise of its functions.

- 38 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.
- 39 The Court notes that the Respondent has agreed, as the relevant consent authority, under s 38 of the Environmental Planning and Assessment Regulation 2021 to the Applicant amending Development Application No DA/580/2022 to rely upon the following amended plans and documents:

<i>Plan</i>	<i>Drawn by</i>	<i>Dated</i>
<i>Architectural and Landscape</i>		
A 2.000 Revision B	Hill Thalys	08/08/2023
A 2.026 Revision B	Hill Thalys	08/08/2023
A 2.027 Revision B	Hill Thalys	08/08/2023
A 2.028 Revision A	Hill Thalys	07/11/2022
A 2.029 Revision A	Hill Thalys	07/11/2022
A 2.100 Revision C	Hill Thalys	08/08/2023
A 2.109 Revision D	Hill Thalys	08/08/2023
A 2.110 Revision G	Hill Thalys	08/08/2023
A 2.111 Revision E	Hill Thalys	08/08/2023
A 2.112 Revision H	Hill Thalys	08/08/2023
A 2.113 Revision F	Hill Thalys	08/08/2023
A 2.114 Revision D	Hill Thalys	08/08/2023

A 2.201 Revision E	Hill Thalís	08/08/2023
A 2.202 Revision C	Hill Thalís	08/08/2023
A 2.203 Revision A	Hill Thalís	07/11/2022
A 2.204 Revision B	Hill Thalís	08/08/2023
A 2.205 Revision B	Hill Thalís	08/08/2023
A 2.211 Revision A	Hill Thalís	07/11/2022
Landscape Design Concept LA-03 to LA025 Issue D	Turf	August 2023
<i>Reports</i>	<i>Author</i>	<i>Date</i>
Ecological Letter – (DA580/2022 – 11 Jennifer St, Little Bay (Detailed design application), prepared by E. Ashby	Keystone Ecological	04/04/2023
Bushfire response to plan amendments letter, prepared by J. Travers	Travers Environmental Pty Ltd	04/04/2023
Noise and Vibration Impact Assessment – Project No. P00366 rev. 002	E-LAB Consulting	14/06/2023
<i>BASIX Certificate No. 1349953M_03</i>		16 August 2023
Nathers Certificate No.2LWNICFWB7		15 August 2023

40 The Applicant filed the amended application with the Court on 23 August 2023.

Orders:

41 The Court orders:

- (1) Pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, the Applicant is to pay the Respondent's costs thrown away as a result of amendment of the development application in a sum of \$6,000.00.
- (2) The Applicant's written request under cl 4.6 of the Randwick Local Environmental Plan 2012 (RLEP) prepared by Planning Ingenuity dated 9 November 2022 seeking to vary the height in cl 4.3 of the RLEP is upheld.
- (3) The appeal is upheld.
- (4) Development consent is granted to development application No DA/580/2022 for a stage 2 construction of 3 x part 3 to part 4-storey residential flat buildings with 75 apartments, common basement level car parking for 117 cars, the partial removal of onsite vegetation and replacement landscaping at 11 Jennifer Street, Little Bay subject to the conditions of consent at Annexure A. The development also comprises the retention of Eastern Suburbs Banksia Scrub vegetation within the southern portion of the site.

S Porter

Commissioner of the Court

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