



Land and Environment Court

New South Wales

Case Name:	Perpetual Trustee Company Limited v Randwick City Council
Medium Neutral Citation:	[2021] NSWLEC 1355
Hearing Date(s):	Conciliation conference on 18 and 31 March, 13 April 2021, 3 and 17 May 2021
Date of Orders:	17 June 2021
Decision Date:	17 June 2021
Jurisdiction:	Class 1
Before:	Horton C
Decision:	The Court orders that: (1) The Applicant is granted leave to amend Development Application No DA/414/2020 and rely upon the following amended plans and documents contained at Annexure 'A'. (2) The Applicant is to pay the Respondent's costs thrown away as agreed or assessed pursuant to s.8.15(3) of the Environmental Planning and Assessment Act 1979. (3) The appeal is upheld. (4) The development application no. DA/414/2020, as amended, for the demolition of existing structures and construction of a mixed use development comprising basement, ground and first floor commercial/retail use and a 175 room boarding house above, pedestrian through link, parking and landscaping at 172 to 180 Anzac Parade and 116R Todman Avenue, Kensington, is approved subject to the conditions contained at Annexure 'B'.
Catchwords:	DEVELOPMENT APPLICATION – mixed use development – affordable rental housing – community

infrastructure contributions – conciliation conference –
agreement between parties – orders

Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 4.16, 8.7, 8.15 Environmental Planning and Assessment Regulation 2000 Land and Environment Court Act 1979, s 34 Randwick Local Environmental Plan 2012, cll 4.3, 4.4, 5.10, 6.2, 6.3, 6.4, 6.8, 6.10, 6.11, 6.17, 6.18, 6.19, 6.20, 6.21 State Environmental Planning Policy (Affordable Rental Housing) 2009, cll 29, 30, 30A State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy No 55 – Remediation of Land, cl 7
Texts Cited:	Kensington and Kingsford Development Control Plan 2020 Kensington and Kingsford Town Centres Affordable Housing Plan Kensington and Kingsford Town Centres Community Infrastructure Contributions Plan Randwick Comprehensive Development Control Plan 2012
Category:	Principal judgment
Parties:	Perpetual Trustee Company Limited (Applicant) Randwick City Council (Respondent)
Representation:	Counsel: A Galasso SC (Applicant) J Lazarus SC (Respondent) Solicitors: Mills Oakley (Applicant) Randwick City Council (Respondent)
File Number(s):	2020/301752
Publication Restriction:	No

JUDGMENT

- 1 **COMMISSIONER:** This class 1 appeal concerns a development application brought before the Court under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) following the deemed refusal by the Randwick City Council (the Respondent) of Development Application No. DA/414/2020 for the demolition of existing structures, and the construction of a mixed use development comprising basement, ground floor and first floor commercial/retail spaces and a boarding house of 175 rooms, basement parking, pedestrian through-site link and landscaping at 172-180 Anzac Parade, and 116R Todman Avenue, Kensington (the site).
- 2 The site comprises the following allotments:
 - Lot A in DP 443852, otherwise known as 172 Anzac Parade;
 - Lot B in DP 443852, otherwise known as 174 Anzac Parade;
 - Lot 1 in DP 101928, otherwise known as 176 Anzac Parade;
 - Lot 1 in DP 939269, otherwise known as 178 Anzac Parade;
 - Lot 1 in DP 100295, otherwise known as 180 Anzac Parade; and
 - Lot 1 in DP 561709, Lots 1 and 2 in DP 1131969, otherwise known as 116R Todman Avenue.
- 3 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 18 March 2021, and at which I presided.
- 4 The proceedings commenced onsite, after which the parties continued conciliation discussions at which the parties reached in-principle agreement on the matters in contention, subject to the resolution of a number of matters which the parties' advised me were capable of resolution. I adjourned the conciliation conference to allow the parties to continue to resolve those matters.
- 5 I adjourned the conciliation conference on a number of occasions. On 25 May 2021 a signed agreement prepared in accordance with s 34(10) of the LEC Act was filed with the Court. This decision involved the Court upholding the appeal and granting conditional development consent to the development application.

- 6 The parties ask me to approve their decision as set out in the agreement before the Court. In general terms, the agreement approves the development subject to amended plans that were prepared by the applicant, and noting that the final detail of the works and plans are specified in the agreed conditions of development consent annexed to the s 34 agreement.
- 7 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 a decision that the Court could have made in the proper exercise of its functions. The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application. There are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 8 The parties identified the jurisdictional prerequisites of relevance in these proceedings including the provisions of the following environmental planning instruments:
- Randwick Local Environmental Plan 2012 (RLEP),
 - State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH),
 - State Environmental Planning Policy No 55 – Remediation of Land (SEPP 55),
 - State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.
- 9 I am satisfied that the jurisdictional preconditions identified by the parties have been achieved for the reasons that follow.
- (1) The site is located within the B2 Local Centre zone pursuant to the RLEP, in which the uses proposed by the development application are permitted with consent, and wherein the objectives of the zone are as follows:
- 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 enable residential development that is well-integrated with, and supports the primary business function of, the zone.
 - To facilitate a high standard of urban design and pedestrian amenity that contributes to achieving a sense of place for the local community.

- To minimise the impact of development and protect the amenity of residents in the zone and in the adjoining and nearby residential zones.
 - To facilitate a safe public domain.
- (2) The proposed development exceeds the height of buildings development standard shown on the height of buildings map at cl 4.3(2) of the RLEP, and exceeds the floor space ratio (FSR) applicable to the site at cl 4.4 of the RLEP. However, cl 6.17(2) of the RLEP provides that, despite the limits imposed by cll 4.3 and 4.4, the development may seek additional building height or FSR, or both, if the development includes community infrastructure on the site.
- (3) I am satisfied that additional height and FSR may be consented to in accordance with cl 6.17(3) of the RLEP for the following reasons:
- Firstly, I accept that additional height and density is consistent with the objectives of cl 6.17 of the RLEP to allow greater building heights and densities where community infrastructure is also provided, and where the same reflects the desired character of the localities in which they are allowed and minimises adverse impacts on the amenity of those localities, and where the intensity of development is commensurate with the capacity of existing and planned infrastructure.
 - Secondly, I am satisfied at the necessity, nature and value of the community infrastructure proposed by the Applicant in the letter of offer dated 19 April 2021 as it is consistent with the Kensington and Kingsford Town Centres Community Infrastructure Contributions Plan, of which I have taken account, and in respect of which deferred commencement conditions are proposed at Condition A1 and A2, and conditions of consent at Conditions 4 and 5.
- (4) In addition to the height permitted under s 6.17 of the RLEP, further additional height is available to development that exhibits design excellence under cl 6.21 of the RLEP. On the basis of the design excellence statement prepared by BVN dated 5 March 2021, and the agreement between the urban design experts, to which I have had regard, I am satisfied that those matters set out at subcl (4) and (5) have been addressed and the development exhibits design excellence. Accordingly, I am also satisfied that proposed development may exceed the height shown in the additional height map by 6m, in accordance with subcl (7), and that an amount of floor space equal to that of the community infrastructure may be excluded in accordance with subcl (8), to achieve an FSR of 5.99:1 which is the allowable FSR once the operation of the bonus permitted by cl 29(1)(c)(ii) of the SEPP ARH is considered.
- (5) I also accept that the area of non-residential floor space in the development, expressed at 1:1, is consistent with the Non-Residential Floor Space Ratio Map at cl 6.19(2) of the RLEP.
- (6) While the site is not identified in Schedule 5 of the RLEP as an item of heritage significance, and is not located in a heritage conservation area, No's 172-180 Anzac Parade are identified in the Kensington and Kingsford Development Control Plan (K2K DCP) as contributory

buildings, and the heritage items known as 'Cooma', and the Kensington Public School are located in close proximity. I have read the Heritage Impact Statement prepared by Urbis dated 9 March 2021 and I consider the effect of the proposed development on the contributory buildings and heritage items to be acceptable, in accordance with cl 5.10(4) of the RLEP. In particular, I note the agreement of the heritage experts as to the manner in which the contributory buildings are integrated into the development, and the requirement for certain schedules and plans to be prepared in accordance with Conditions 26-28 of the agreed conditions of consent.

- (7) I have considered the Preliminary Geotechnical Investigation dated 5 August 2020, and the Civil Engineering plans prepared by Northrop dated 5 August 2020, as well as Conditions 24 and 43 of the agreed conditions of consent and I conclude that the proposed earthworks and excavation will not have a detrimental impact on the soil stability of the amenity of the neighbouring uses or the adjacent light rail infrastructure, and I consider those matters at cl 6.2(3) of the RLEP to be appropriately addressed.
- (8) Clause 6.3(3) of the RLEP requires the consent authority, or the Court on appeal, to be satisfied that the development is compatible with the flood hazard of the land, will not significantly adversely affect flood behaviour resulting in detrimental increases in the potential flood affectation of other development or properties, incorporates appropriate measures to manage risk to life from flood, will not significantly adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses, and is not likely to result in unsustainable social and economic costs to the community as a consequence of flooding. I have read the 'Stormwater and Floodplain Management report' prepared by Northrop dated 13 August 2020 and I note the conclusions record substantial conformity with Council's requirements. I also note the proposed conditions of consent at Conditions 55-58 which are directly relevant and I am satisfied of those matters at subcll 6.3(3)(a)-(e) of the RLEP.
- (9) For similar reasons, and having regard to the Civil Engineering plans prepared by Northrop dated 5 August 2020 and the agreed conditions of consent at Conditions 59 and 60, I am also satisfied that the proposed development will incorporate appropriate measures to manage stormwater in accordance with cl 6.4 of the RLEP.
- (10) I consider the agreed conditions of consent at Condition 7, being conditions advised by Sydney Airport, to satisfy the requirements of cl 6.8 of the RLEP in respect of airspace operations.
- (11) On the basis of conditions of consent and general terms of approval from authorities in respect of public utilities (condition 71), water (conditions 8 and 37), electricity (condition 31), sewage (condition 135), stormwater drainage (conditions 55-58), and suitable vehicular access (conditions 44-51, 100 and 132-134), I am satisfied that adequate

arrangements have been made to make essential services available for the site when required in accordance with cl 6.10 of the RLEP.

- (12) For the reasons set out at [9(4)], I am satisfied that the proposed development exhibits design excellence pursuant to cl 6.11 of the RLEP.
- (13) In accordance with cl 6.18 of the RLEP, Condition 115 of the agreed conditions of consent requires a contribution equivalent to the affordable housing levy contribution be imposed, and I am satisfied that the monetary contribution is for the purposes of boarding houses (subcl (4)(b)), and is calculated in accordance with the Kensington and Kingsford Town Centres Affordable Housing Plan (subcl (5)).
- (14) Consent for the erection of a building on land to which the Active Frontages provision at cl 6.20 of the RLEP applies must not be granted unless the consent authority is satisfied that all premises on the ground floor of the building facing the street are to be used for the purposes of commercial premises after the erection of the building. On the basis of the architectural plans, I am satisfied that the overwhelming proportion of the street frontage is active, and that the frontage otherwise allocated to building services and fire egress should not preclude the grant of consent.
- (15) As the development is boarding house development, the provisions of the SEPP ARH apply and I am satisfied that the proposal conforms to those standards at cl 29 of the SEPP ARH for which, if achieved, consent must not be refused.
- (16) Development standards that must be achieved by boarding house development to permit the grant of consent are found at cl 30 of the SEPP ARH. On the basis of the Summary of changes and compliance prepared by Willowtree planning dated 21 April 2021, and by reference to the architectural plans prepared by BVN Architects, I am satisfied that those standards applicable to the development the subject of the development application are complied with.
- (17) I have taken into consideration whether the proposed development is compatible with the character of the local area in accordance with cl 30A of the SEPP ARH and I accept that the existing character is considered in the modulation and setback of the built form at the lower level of the development, while the provisions at cl 6.17-6.21 of the RLEP, and Part E of the Randwick Comprehensive Development Control Plan 2013 (RCDCP), support a desired future character in the Kensington Town Centre of significant transition with which the proposed development is consistent. In particular, I note consistency with the 3-dimensional block plan for the subject site identified as 'K2 site, Todman Square', Part B of the K2K DCP.

State Environmental Planning Policy No 55 – Remediation of Land (SEPP 55)

- 10 The Applicant relies upon a Preliminary Stage 1 Environmental Assessment prepared by JK Environments dated 4 August 2020, which concludes that the

site can be made suitable for the proposed development subject to particular recommendations. Additionally, a Site Suitability Statement also prepared by JK Environments dated 31 March 2021 concludes, at p 3, that no contamination was found that would preclude the proposed development, subject to implementation of a remediation action plan that is the subject of condition 20(2), following a Detailed Site Contamination Report (Condition 20) of the agreed conditions of consent. On this basis, I am satisfied in respect of those matters at cl 7 of SEPP 55.

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

- 11 The application is also accompanied by a BASIX certificate (Certificate No. 1121323M_02 dated 4 May 2021) prepared in accordance with State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 and the Environmental Planning and Assessment Regulation 2000.

Conclusion

- 12 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.
- 13 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.

Orders

- 14 The Court orders that:
- (1) The Applicant is granted leave to amend Development Application No DA/414/2020 and rely upon the following amended plans and documents contained at Annexure 'A'.
 - (2) The Applicant is to pay the Respondent's costs thrown away as agreed or assessed pursuant to s.8.15(3) of the *Environmental Planning and Assessment Act 1979*.
 - (3) The appeal is upheld.
 - (4) The development application no. DA/414/2020, as amended, for the demolition of existing structures and construction of a mixed use development comprising basement, ground and first floor commercial/retail use and a 175 room boarding house above,

pedestrian through link, parking and landscaping at 172 to 180 Anzac Parade and 116R Todman Avenue, Kensington, is approved subject to the conditions contained at Annexure 'B'.

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T Horton

Commissioner of the Court

Annexure A (113599, pdf)

Annexure B (2364120, pdf)

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