



Land and Environment Court
New South Wales

Case Name: Altis Bulky Retail Pty Ltd v Lane Cove Municipal Council

Medium Neutral Citation: [2024] NSWLEC 1619

Hearing Date(s): 27-28 June 2024, written submissions on conditions received 11 July 2024.

Date of Orders: 04 October 2024

Decision Date: 4 October 2024

Jurisdiction: Class 1

Before: Porter C

Decision: The Court orders:
(1) The appeal is dismissed.
(2) Development Application No. 155/2022 for the demolition of existing structures, tree removal, construction of a part 11, part 12 storey mixed use development across two buildings containing a total of 130 apartments, a centre-based child care facility shell, community facility, basement parking for 183 vehicles and associated earthworks and landscaping at 12-20 Berry Road and 11-19 Holdsworth Avenue, St Leonards is determined by refusal of consent.
(3) The exhibits are returned except for 1, 2, 3, 4 and A.

Catchwords: DEVELOPMENT APPEAL – mixed use development – incentive provisions – preconditions – recreation area – consistency of documentation – design excellence

Legislation Cited: Environmental Planning and Assessment Act 1979 s 4.15, 7.4, 8.7

Lane Cove Local Environmental Plan 2009, cl 7.1, 7.2, 7.3, 7.4, 7.5, 7.6

State Environmental Planning Policy (Housing) 2021

Cases Cited: Australian Protein Recyclers Pty Limited v Goulburn Mulwaree Shire Council [2006] NSWLEC 641

Texts Cited: Apartment Design Guide 2015
Lane Cove Development Control Plan 2010
Child Care Planning Guideline 2021

Category: Principal judgment

Parties: Altis Bulky Retail Pty Ltd (Applicant)
Lane Cove Municipal Council (Respondent)

Representation: Counsel:
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File Number(s): 2023/210008

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** The Applicant, Altis Bulky Retail Pty Ltd (Altis) has appealed pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against Lane Cove Municipal Council's (Council) actual refusal of Development Application No. 155/2022 (DA), determined by the Sydney North Planning Panel. The DA seeks consent for the demolition of existing structures, tree removal, construction of a part 11, part 12 storey mixed use development across two buildings containing a total of 130 apartments, a centre-based child care facility shell, community facility, basement parking for 183 vehicles and associated earthworks and landscaping at 12-20 Berry Road and 11-19 Holdsworth Avenue, St Leonards. The DA is accompanied by a draft Planning Agreement dated 3 April 2023 (Draft PA).
- 2 The DA is not for integrated development. However General Terms of Approval have been received from WaterNSW.

- 3 A number of issues were raised by Council. With consideration of the evidence and submissions, I find that there is no power to grant consent as the DA does not satisfy the incentive provisions requirements to access increased height and Floor Space Ratio on Area 17 of the Lane Cove Local Environmental Plan 2009 (LCLEP), and therefore exceeds the maximum allowable height and FSR development standards. The appeal must therefore be dismissed.

The site and context

- 4 The subject sites comprise 12-20 Berry Road, St Leonards, legally known as lots 31-33, Section 2, DP 7259 and Lots A and B, DP 110452 and 11-19 Holdsworth Avenue, St Leonards, legally known as lots 10-14, Section 2, DP 7259.
- 5 Part 7 of the LCLEP provides incentive provisions for residential development in the St Leonards South Area (Precinct), that are split into areas. The subject properties align with the following areas:
- (1) Area 16 - Holdsworth Avenue facing properties.
 - (2) Area 17 - Berry Road facing properties.
- 6 Area 17 is approximately 2,229m² and Area 16 is 2,786m². Both areas have a significant fall across the sites, as do most sites within the Precinct.
- 7 The Precinct is undergoing significant urban renewal from its former low density character, with most sites either under construction or benefiting from an approval utilising the incentive provisions of Part 7 of the LCLEP. The zoning of the Precinct and subject sites is R4 High Density Residential under the LCLEP.

Key issues

- 8 At the hearing, Council pressed the following contentions in its Amended Statement of Facts and Contentions (Ex A) that it contends should warrant refusal:
- (1) Number of storeys.
 - (2) Building setbacks (Berry Road, Holdsworth Avenue and the pedestrian link).
 - (3) Topography response.

- (4) Design excellence.
 - (5) Deep soil landscaping.
 - (6) State Environmental Planning Policy (Housing) 2021, design quality principles.
 - (7) Architectural Design Guidelines.
 - (8) Child care centre.
 - (9) Environmental, built and social impacts.
 - (10) Site suitability.
 - (11) Public interest.
 - (12) Precedent.
- 9 The following issues raised were agreed to be resolved:
- (1) Insufficient information.
- 10 The issues can be distilled as follows:
- Preconditions to access height and FSR incentives.
 - Storeys.
 - Setbacks.
 - Landscaping.
 - Child care shell.

Expert evidence

- 11 Expert evidence for the landscaping issues was submitted in a joint expert report (Landscape JER) (Ex C) by Paul Galluzzo for the Applicant and Toby Piper for Council.
- 12 Expert evidence for the urban design and town planning issues was submitted in a joint expert report (UD and Planning JER) (Ex D) by Stephen Kerr (Town Planner) and Stephen Moore (Urban Designer) for the Applicant and Stephen McMahon (Town Planner and Urban Designer) for Council.
- 13 All experts provided oral evidence at the hearing.

Preconditions to access height and FSR incentives

- 14 Raised by Council within the child care contention, it was contended in contention 8 that the siting, configuration and setting of the floor area for the child care centre is unacceptable and not consistent with the requirements of

the Child Care Planning Guideline 2021, LCLEP and the Lane Cove Development Control Plan 2010 (LCDCP). Contention particulars 8(e) and (f) raise issues that there is no certainty that the areas nominated for a recreation area and community facility, required by cl 7.4(c) of the LCLEP, can be used for the stated purpose. The particulars also refer back to contention 8(d), in relation to outdoor space size, visual impacts from fencing, access and visibility concerns, solar access, internal layout, acoustic and privacy impacts and ability to accommodate 60 children.

- 15 A precondition to access the LCLEP incentive provisions and ultimately, ability to grant of consent, is the proposed development's satisfaction of various elements of Part 7 of the LCLEP. The relevant clauses are set out below:

7.1 Development on land in St Leonards South Area

(1) The objective of this clause is to promote, by providing building height and floor space incentives, residential development within the St Leonards South Area that provides for—

(a) community facilities, open space, including communal open space, and high quality landscaped areas, and

(b) efficient pedestrian and traffic circulation, and

(c) a mix of dwelling types in residential flat buildings, providing housing choice for different demographics, living needs and household budgets, including by providing affordable housing, and

(d) the amalgamation of lots to prevent the fragmentation or isolation of land.

(2) This clause applies to development that involves the erection of 1 or more new buildings for the purposes of residential flat buildings on land within the St Leonards South Area.

(3) Despite clauses 4.3 and 4.4, the consent authority may consent to development on land to which this clause applies that will result in a building with both of the following—

(a) a building height that does not exceed the increased building height identified on the *Incentive Height of Buildings Map*,

(b) a floor space ratio that does not exceed the increased floor space ratio identified on the *Incentive Floor Space Ratio Map*.

(4) Development consent must not be granted under this clause unless the consent authority is satisfied that—

(a) at least 20% of the total number of dwellings (to the nearest whole number of dwellings) contained in the development will be studio or 1 bedroom dwellings, or both, and

(b) at least 20% of the total number of dwellings (to the nearest whole number of dwellings) contained in the development will be 2 bedroom dwellings, and

(c) at least 20% of the total number of dwellings (to the nearest whole number of dwellings) contained in the development will be 3 or more bedroom dwellings, and

(d) the development will provide appropriate building setbacks to facilitate communal open space between buildings, and

(e) the development will comply with the requirements of clause 7.2 in relation to the minimum site area of the development, and

(f) the development will, if applicable, comply with the requirements of clause 7.3 in relation to the minimum number of dwellings that will be used for the purposes of affordable housing, and

(g) the development will, if applicable, comply with the requirements of clause 7.4 in relation to the minimum area that will be used for the purposes of recreation areas and community facilities, and

(h) the development will, if applicable, comply with the requirements of clause 7.5 in relation to the provision of pedestrian links and roads.

(5) In this Part—

(a) a reference to a numbered Area means an Area as identified on the *Key Sites Map*, and

(b) for the purposes of the definition of *affordable housing* in the Act, a household is taken to be a very low income household, low income household or moderate income household if the household meets the requirements of *State Environmental Planning Policy (Housing) 2021*, section 13.

7.2 Minimum site area requirements

For the purposes of clause 7.1(4)(e), the minimum site area for development on land to which clause 7.1 applies is the area specified in the table to this clause.

Column 1	Column 2
Area 16	2,500 square metres
Area 17	2,200 square metres

7.3 Minimum affordable housing requirements

For the purposes of clause 7.1(4)(f), the following is the minimum number of dwellings required to be used for the purposes of affordable housing in development on land to which clause 7.1 applies—

...

(d) for Area 13 or Area 17—1 dwelling.

7.4 Minimum recreation area and community facility requirements

For the purposes of clause 7.1(4)(g), the following requirements apply to development on land to which clause 7.1 applies—

...

(c) for Area 5 or Area 17—

(i) at least 450 square metres will be used for the purposes of a recreation area, and

(ii) at least 600 square metres will be used for the purposes of a community facility, and

(iii) the recreation area will be adjacent to the community facility.

7.5 Requirements for pedestrian links and roads

For the purposes of clause 7.1(4)(h), the following publicly accessible pedestrian links and roads are required to be provided for development on land to which clause 7.1 applies—

...

(c) for Area 15 or Area 16—a 15 metre wide pedestrian link through the land to enable a connection between Berry Road and Holdsworth Avenue,

...

7.6 Design excellence—St Leonards South Area

(1) The objective of this clause is to deliver the highest standard of architectural, urban and landscape design.

(2) This clause applies to land within the St Leonards South Area.

(3) Development consent must not be granted for development to which this clause applies unless the consent authority considers that the development exhibits design excellence.

(4) In considering whether the development exhibits design excellence, the consent authority must have regard to the following matters—

(a) whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved,

(b) whether the form and external appearance of the development will improve the quality and amenity of the public domain,

(c) whether the development protects and enhances the natural topography and vegetation including trees or other significant natural features,

(d) whether the development detrimentally impacts on view corridors,

(e) whether the development achieves transit-oriented design principles, including the need to ensure direct, efficient and safe pedestrian and cycle access to nearby transit nodes,

(f) the requirements of the *Lane Cove Development Control Plan*,

(g) how the development addresses the following matters—

(i) the suitability of the land for development,

- (ii) existing and proposed uses and use mix,
 - (iii) heritage issues and streetscape constraints,
 - (iv) the relationship of the development with other development (existing or proposed) on the same site or on neighbouring sites in terms of separation, setbacks, amenity and urban form,
 - (v) bulk, massing and modulation of buildings,
 - (vi) street frontage heights,
 - (vii) environmental impacts such as sustainable design, overshadowing, wind and reflectivity,
 - (viii) the achievement of the principles of ecologically sustainable development,
 - (ix) pedestrian, cycle, vehicular and service access, circulation and requirements,
 - (x) the impact on, and any proposed improvements to, the public domain,
 - (xi) the configuration and design of publicly accessible spaces and private spaces on the site.
- (5) In this clause—

Lane Cove Development Control Plan means the Lane Cove Development Control Plan, as in force at the commencement of Lane Cove Local Environmental Plan 2009 (Amendment No 40).

- 16 The LCDCP states in Part A Introduction under clause 1.4 Block Plans that “A priority will be the achievement of the floor space in the LEP, notwithstanding the DCP’s provisions and controls.”
- 17 Also relevant to this issue are the following sections of the EPA Act in relation to Planning Agreements:

4.15 Evaluation

(1) Matters for consideration—general In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application—

- (a) the provisions of—

...

- (iia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and

...

7.4 Planning agreements

(1) A planning agreement is a voluntary agreement or other arrangement under this Division between a planning authority (or 2 or more planning authorities) and a person (the *developer*)—

...

(b) who has made, or proposes to make, a development application or application for a complying development certificate, or

...

(2) A public purpose includes (without limitation) any of the following—

(a) the provision of (or the recoupment of the cost of providing) public amenities or public services,

(b) the provision of (or the recoupment of the cost of providing) affordable housing,

(c) the provision of (or the recoupment of the cost of providing) transport or other infrastructure relating to land,

(d) the funding of recurrent expenditure relating to the provision of public amenities or public services, affordable housing or transport or other infrastructure,

(e) the monitoring of the planning impacts of development,

(f) the conservation or enhancement of the natural environment.

...

(9) A planning agreement cannot impose an obligation on a planning authority—

(a) to grant development consent, or

(b) to exercise any function under this Act in relation to a change to an environmental planning instrument.

...

7.7 Circumstances in which planning agreements can or cannot be required to be made(cf previous s 93I)

(1) A provision of an environmental planning instrument (being a provision made after the commencement of this section)—

(a) that expressly requires a planning agreement to be entered into before a development application or application for a complying development certificate can be made, considered or determined, or

(b) that expressly prevents a development consent from being granted or having effect unless or until a planning agreement is entered into,

has no effect.

(2) A consent authority cannot refuse to grant development consent on the ground that a planning agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into such an agreement.

(3) However, a consent authority can require a planning agreement to be entered into as a condition of a development consent, but only if it requires a

planning agreement that is in the terms of an offer made by the developer in connection with—

(a) the development application or application for a complying development certificate, or

...

(4) In this section, planning agreement includes any agreement (however described) containing provisions similar to those that are contained in an agreement referred to in section 7.4.”

- 18 In relation to height and FSR, cl 7.1(3) provides the following incentives.
- (1) Area 16:
 - (a) Increase from the maximum height under cl 4.3 from 9.5m to part 37m, part 2.5m.
 - (b) Increase from the maximum FSR under cl 4.4 from 0.5-0.6:1 to 2.85:1.
 - (2) Area 17:
 - (a) Increase from the maximum height under cl 4.3 from 9.5m to part 38m, part 2.5m
 - (b) Increase from the maximum FSR under cl 4.4 from 0.5-0.6:1 to 3.8:1.
- 19 There is no dispute that the proposed development is within the numerical incentive height and FSR provisions. The parties also agree that cl 7.1(2) and subcll (4)(a)-(c), (f), (h), cl 7.2 site area, cl 7.3(d) affordable housing and cl 7.5(c) pedestrian links are met, which I accept, as demonstrated on the architectural plans prepared by Turner Architects (Ex 2) (Architectural Plans) and Addendum Statement of Environmental Effects (Addendum SEE) prepared by Gyde Consulting dated 18 April 2024 (Ex 2). In dispute is cl 7.1(4), subcll (d) and (g) and cl 7.4 in relation to the recreation area and communal open space between buildings, and cl 7.6 design excellence.
- 20 Subclauses 7.1(4)(g) and 7.4(c)(i) require a recreation area of 450m², community facility of 600m² and for the recreation area to be adjacent to the community facility on Area 17. There is no dispute about the provision of 600m² community facility spaces - proposed as a 450m² child care centre and 150m² community centre.
- 21 In dispute is the minimum recreation area of 450m², which must be located on Area 17.

Evidence

- 22 Both planning experts were taken to a drawing titled '999_Supplementary Drawings Childcare external area and solar calculations' prepared by Turner Architects (recreation area diagram) which was included towards the end of the UD and Planning JER attachments. The recreation area diagram shows two recreation areas in blue, being a 313m² portion and 137m² portion.
- 23 In oral evidence, Mr Kerr, town planner for Altis, was asked to identify where the 450m² recreation area was located within Area 17, as it appeared to be partially located in Area 16. Mr Kerr agreed that the recreation area diagram showed part of the larger 313m² area encroaching into Area 16 and there was no plan showing 450m² on Area 17. Mr Kerr's evidence was that the Draft PA proposed 450m² and that the recreation areas in Area 17 can be extended to meet the numerical requirement.
- 24 In oral evidence, Mr McMahon, town planner for Council, agreed that the larger recreation area could be extended to the north and to the south. Mr McMahon's evidence was that this might conflict with the Apartment Design Guide's (ADG) communal open space requirements. Mr McMahon's evidence was that the Draft PA's offer of 450m² might be inconsistent with an approval.

Altis' Submissions

- 25 Altis submits that there is no contention that raises the issue of a portion of the recreation area being located in Area 16 as distinct from Area 17.
- 26 Under s 4.15(1)(a)(iii) of the EPA Act, a draft planning agreement is a matter that is required to be taken into account. The DA is accompanied by a Draft PA that proposes 450m² of recreation area.
- 27 The proposed development satisfies subcll 7.1(4)(g) of the LCLEP. The proposed development is manifest in the plans and offer in the Draft PA. The Draft PA provides a commitment to provide 450m² of recreation area and operates with the plans and landscape plans to satisfy cl 7.1 and cl 7.4 of LCLEP. The planning experts identified parts of Area 17 on the architectural plans that can be included to achieve the 450m².

- 28 Altis submits that whilst the Court could make a direction to require the nomination of 450m² on Area 17, the preferred position is to accept that the Draft PA is part of the proposed development and offers the 450m² on the site.

Council's submissions

- 29 Council submits that Contention 8 raises that the recreation area has not been identified. There is no plan that identifies the recreation area, as defined by the LCLEP. The draft PA offer or plans do not show if the 450m² can be provided in Area 17 in its current form, without modifications to the proposed development or with unknown impacts. The current level of detail does not provide certainty. The current plans do not identify a quantum of 450m² on Area 17 and the requirements of cll 7.4 and 7.1(4) have not been satisfied.

Findings

- 30 In relation to the submissions that the issue of the recreation area was not raised in the contentions, I find that contention 8 does raise the issue. Particular (e) raises the issue that there was no certainty that the recreation area and community facility nominated could be used for the stated purpose. Particular (f) refers to an undersized useable outdoor play space.
- 31 Ultimately, the burden is on the applicant to persuade the consent authority, or the Court on appeal, that development consent should be granted (*Australian Protein Recyclers Pty Limited v Goulburn Mulwaree Shire Council* [2006] NSWLEC 641 at [2]). There was no request to adjourn the proceedings to address the issue and Altis submitted that the relevant cll 7.1(4) and 7.4 were satisfied.
- 32 For the reasons given below, I accept that the minimum recreation area required by cl 7.1(4) and cl 7.4 has not been provided for Area 17 and there is no power to grant consent.
- 33 Clause 7.1(4) of the LCLEP requires that development consent must not be granted under the incentive provisions of cl 7.1 unless the minimum requirements of cl 7.1(4)(g) and cl 7.4(c) are complied with. That state of satisfaction must occur at the time of granting consent and cannot be deferred.

- 34 I accept Senior Counsel's submissions that the works in the Draft PA form part of the proposed development. The Draft PA specifically states that 450m² is to be provided on Area 17 (Ex 2, Tab 11).
- 35 However, as submitted by Council, I accept that the proposed development described in the draft PA needs to be capable of being accommodated with the proposed development shown on the architectural and landscaped plans with a degree of certainty. As submitted, I accept that the recreation area needs to meet the definition in the LCLEP, being a place used for outdoor recreation that is normally open to the public.
- 36 The recreation area diagram depicts two recreation areas, 313m² and 137m², totalling 450m² (Ex D, located towards the end of the annexures). I accept that part of the larger recreation area falls onto Area 16 and that 450m² of recreation area is not shown on the architectural or landscape plans on Area 17, consistent with the oral evidence of the planning experts.
- 37 The recreation area is referenced throughout the accompanying documentation, including the Draft PA, UD and Planning JER and Addendum SEE. I accept the submissions of Council that there is no other reference found in the architectural plans or landscape plans of a defined 450m² area or areas on Area 17. Accordingly, there is an inconsistency between what is proposed in the Draft PA, and what is proposed on the architectural plans and landscape plans.
- 38 The expert planners' agreed evidence was that it might be possible to extend the recreation areas to the north and south to achieve the minimum area. Mr McMahon considered that there might be some implications to the proposed communal open space and ADG requirements.
- 39 Focusing on Area 17, the architectural and landscape plans show structures, ramps, overhead ramps or pathways, in or around the recreation area spaces. The communal open space directly adjoins and surrounds the larger recreation area to the south and east. Including the footpath linking the two buildings, the communal open space exceeds the ADG requirements of 25%, at 26.8% (architectural plan drawing DA-720-005).

- 40 Whilst it is likely possible to extend the recreation areas to achieve the minimum area, the evidence before the Court does not show a clear area to achieve this without a likely redesign. Firstly, it is unclear how much additional recreation area is required.
- 41 Secondly, I accept the evidence of Mr McMahon that further recreation area to the south in the green spine will likely impact the proposed communal open space. This may or may not be manageable given the communal open space requirements are exceeded, but that potential impact is unknown. Further, it is unknown whether the footpath thoroughfare between the two buildings would be impacted if the recreation area was expanded south.
- 42 Expansion to the north may require some redesign or impacts on the graded footpaths, entrance to the child care centre, or lift to the community facility. Parts of these areas may not be able to be included with consideration of the LCLEP definition of recreation area as a place for outdoor recreation.
- 43 Similarly, the potential expansion of the small recreation area to the south is limited. Located a few metres below Berry Road, underneath the residential entry ramp, and if taken further south, adjoining bicycle and/or storage areas lacking passive surveillance, it is unclear how much of that area could be utilised and defined as recreation area without changes to the building's design.
- 44 It is reasonable to assume that most DA's have some form of inconsistent documentation. This is also recognised in the draft conditions of consent at condition 1, where inconsistencies between plans, documentation and conditions are given a hierarchy of which one prevails. In this instance, should the Draft PA prevail over the approved plans, it is my view that the outcome on what would be the approved lower floor and ground floor plans is unknown. The location and provision of the minimum recreation area on Area 17 is therefore unknown.
- 45 On the evidence, I accept Council's submissions that the minimum required recreation area of 450m² has not been demonstrated on Area 17 by the proposed development. I accept the submission with consideration of the

documentation accompanying the DA. This element is required to be satisfied when granting consent and cannot be deferred.

- 46 Consequently, as the DA does not satisfy the minimum requirements of subcl 7.1(4)(g) and 7.4(c), the incentive provisions of cl 7.1 do not apply. As cl 7.1 does not apply, the dispensation to cl 4.3 height and 4.4 FSR allowed by cl 7.1(3) does not apply.
- 47 As a result, the proposed development on Area 17 breaches the maximum allowable height and FSR development standards. Clause 4.3 allows a maximum height of 9.5m, the building on Area 17 is approximately 37.5m. Cl 4.4 allows a maximum of FSR of 0.5-0.6:1, the building on Area 17 proposes a FSR of 3.8:1. The DA is absent a cl 4.6 written request. The Court therefore has no power to grant consent and the appeal must be dismissed on this basis.

Conclusion

- 48 The proposed development has not satisfied all the requirements of cl 7.1 of the LCLEP to access the incentive height and FSR provisions. The minimum recreation area size required for Area 17 under cl 7.1(4)(g) has not been demonstrated with adequate certainty, as the Draft PA is inconsistent with the architectural and landscape plans.
- 49 As the preconditions to accessing the incentives of cl 7.1 of the LCLEP have not been met, the incentive height and FSR provisions do not apply and do not override cl 4.3 and 4.4 for Area 17. The proposed development on Area 17 (Berry Road frontage sites) therefore exceeds the maximum height and FSR development standards contrary to cl 4.3(2) and 4.4(2).
- 50 There is no power to grant consent and the DA is refused.

Orders

- 51 The Court orders that:
- (1) The appeal is dismissed.
 - (2) Development Application No. 155/2022 for the demolition of existing structures, tree removal, construction of a part 11, part 12 storey mixed use development across two buildings containing a total of 130 apartments, a centre-based child care facility shell, community facility, basement parking for 183 vehicles and associated earthworks and

landscaping at 12-20 Berry Road and 11-19 Holdsworth Avenue, St Leonards is determined by refusal of consent.

- (3) The exhibits are returned except for 1, 2, 3, 4 and A.

S Porter

Commissioner of the Court

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