



Land and Environment Court
New South Wales

Case Name: Heathcote Tavern 1 Pty Ltd v Sutherland Shire Council

Medium Neutral Citation: [2025] NSWLEC 1780

Hearing Date(s): Conciliation conference 23 October 2025

Date of Orders: 04 November 2025

Decision Date: 4 November 2025

Jurisdiction: Class 1

Before: Walsh C

Decision: The Court orders that:
(1) The Applicant is granted leave to amend Development Application No. 24/0369 in accordance with the plans and documents in Annexure B.
(2) The Applicant's written request made pursuant to cl 4.6 of the Sutherland Shire Local Environmental Plan 2015 to vary the height of building development standard, prepared by Planning Ingenuity, is upheld.
(3) The appeal is upheld.
(4) Development Application No. 24/0369, as amended, for the demolition of existing structures, tree removal, construction of a mixed use development including two buildings being a residential flat building (Building A) containing 53 units and a mixed use building with two wings (Buildings B and C) containing 88 units and tenancies at the lower ground floor and ground floor of Buildings B and C (S2) to accommodate future non-residential uses, intended by the proponent to comprise retail and tavern uses (subject to future assessment and development consent), two basement structures with three levels of basement parking and associated works at 1323-1329 Princes Highway, Heathcote (otherwise known as 1 Veno Street), is determined by the grant of consent, subject to the conditions of

consent at Annexure A.

(5) Order 5 of the short minutes of order made on 22 September 2025 is vacated.

(6) The Applicant is to pay the Respondent's costs thrown away as a result of the amendment granted leave on 22 September 2025 and the amendment set out in Annexure B in accordance with s 8.15(3) of the Environmental Planning and Assessment Act 1979 (NSW), in the sum of \$75,000.00 within 90 days of these orders.

Catchwords:

DEVELOPMENT APPLICATION – conciliation conference – agreement between the parties – orders

Legislation Cited:

Environmental Planning and Assessment Act 1979 (NSW), ss 4.15, 8.7, 8.15

Land and Environment Court Act 1979 (NSW), s 34

Environmental Planning and Assessment Regulation 2021(NSW), ss 29, 38, 82

State Environmental Planning Policy (Biodiversity and Conservation) 2021 Pt 6.2, ss 6.6, 6.7, 6.8, 6.9, 6.10

State Environmental Planning Policy (Housing) 2021 Ch 2, Pt 2, Div 1, ss 16, 21, Ch 4, s 147

State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6

State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.100, 2.119, 2.122

Sutherland Shire Local Environmental Plan 2015, cl 4.3, 4.6, 6.2, 6.4, 6.15, 6.16, 6.17

Cases Cited:

McMillan v Taylor (2023) 111 NSWLR 634; [2023] NSWCA 183

Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827

Category:

Principal judgment

Parties:

Heathcote Tavern 1 Pty Ltd (Applicant)
Sutherland Shire Council (Respondent)

Representation:

Counsel:
A Galasso SC (Applicant)
J Reid (Respondent)

Solicitors:

Mills Oakley (Applicant)
Sutherland Shire Council (Respondent)

File Number(s): 2024/ 363793

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** These proceedings, brought under Class 1 of the Court's jurisdiction, are an appeal pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) against the refusal of Development Application No 24/0369 (DA) by Sydney South Planning Panel (panel). Sutherland Shire Council (Council) is the respondent in the proceedings under s 8.15(4) of the EPA Act, subject to the control and direction of the panel.
- 2 The DA seeks consent for demolition of the existing improvements and construction of a mixed use development at 1323-1329 Princes Highway, Heathcote, and also known as 1 Veno Street (site). The site is legally described as Lot 1 DP 455292; Lot 2 DP 455292; Lot 3 DP 455292; Lot 9 Sec A DP 2499; Lot 10 Sec A DP 2499; Lot 23 Sec A DP 2499; Lot 24 Sec A DP 2499. The site currently comprises the Heathcote Hotel including a bottle shop, accommodation, bistro, function space, surface car parking and ancillary landscaping.
- 3 The description of the proposed development, as now before the Court subsequent to a number of amendments, and as described in Annexure A where consent conditions are nominated, is as follows:

The demolition of existing structures, tree removal, construction of a mixed use development including two buildings being a residential flat building (Building A) containing 53 units and a mixed use building with two wings (Buildings B and C) containing 88 units and tenancies at the lower ground floor and ground floor of Buildings B and C ... to accommodate future non-residential uses, intended by the proponent to comprise retail and tavern uses (subject to future assessment and development consent), two basement structures with three levels of basement parking and associated works...

Conciliation and agreement between the parties

- 4 The Court arranged a conciliation conference between the parties under s 34(1) of the *Land and Environment Court Act 1979* (NSW) (LEC Act), at which I presided. The conference was held on 23 October 2025. Prior to the conference, the parties had come to an 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 and granting consent to the DA, as amended, in accordance with agreed conditions.

Pre-requisites to the exercise of the function to grant development consent

- 5 Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision, provided it is a decision that the Court could have made in the proper exercise of its functions.
- 6 The point of consideration here is whether there are any jurisdictional constraints to the exercise of the function to grant development consent in accordance with the parties' agreement (*McMillan v Taylor* (2023) 111 NSWLR 634; [2023] NSWCA 183 (*McMillan*) at [62]-[65]). Ultimately, I find that there are no such constraints. But there are certain statutory queries which require attention before this function can be exercised by the Court. I attend to the relevant matters below, assisted by the advice in the parties' agreed jurisdictional statement received by the Court on 24 October 2025 (JS).

State Environmental Planning Policy (Resilience and Hazards) 2021

- 7 Pursuant to s 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP), a consent authority must not grant consent to any development unless it has considered whether a site is contaminated or potentially contaminated land, and, if so, is satisfied that the land is suitable (or will be made suitable after undergoing remediation) for the proposed use. There is evidence of certain contaminants on the site. According to the JS, a preliminary hazard analysis, detailed site investigation and remediation action plan (RAP) have all been prepared in relation to the site. Relevantly, the RAP sets out a sequential remediation and validation process in compliance with the relevant guidelines. The RAP finds that the site can be made suitable for the proposed development. In turn the parties are of the view

that upon completion of the approved remediation works, and validation, the land will be suitable for the proposed mixed use residential and commercial development. I accept this advice and the requirements of s 4.6 have been satisfied.

State Environmental Planning Policy (Transport and Infrastructure) 2021

- 8 The parties advise that relevant consideration has been given to s 2.100 of State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport and Infrastructure SEPP) with respect to impact of rail noise or vibration on non-rail development, with proposed Condition 35 addressing relevant requirements. I note with respect to s 2.119 with the proposal does not propose direct vehicular access to the Princes Highway. With respect to s 2.122 (traffic-generating development) the consent authority must give written notice of the application to TfNSW. Council advises it referred the DA to TfNSW and no objections were received

State Environmental Planning Policy (Biodiversity and Conservation) 2021

- 9 The Site is identified as being within the 'Georges River Catchment'. Accordingly, Part 6.2 applies. In relation to this, certain findings of satisfaction are required. The parties' JS works through the various questions with respect to: s 6.6(2) in relation to water quality and quantity and s 6.7(2) in relation to aquatic ecology. The parties indicate I should be satisfied with respect to each of the relevant provisions. The basis for this conclusion of the parties is the technical material accompanying the DA. In particular the Stormwater Management Plans (Tab 28 of Class 1 Application) and Stormwater Management Report (see Tab 20 of Class 1 Application) which indicate that the stormwater management system of the proposed development will connect with existing systems and will have close as possible to a neutral or beneficial effect on discharged water quality (also noting page 6 of Tab 20 Class 1 Application).
- 10 On the basis of the advice of the parties I am satisfied that, with respect to the DA:
- the effect on the quality of water entering a natural waterbody will be as close as possible to neutral or beneficial, and

- the impact on water flow in a natural waterbody will be minimised.
- 11 The parties note that the site is not in the proximity of a body of water, does not involve clearing of riparian vegetation and is not in proximity to any wetlands. In the circumstances I am satisfied that:
- the direct, indirect or cumulative adverse impact on terrestrial, aquatic or migratory animals or vegetation will be kept to the minimum necessary for the carrying out of the development,
 - the development will not have a direct, indirect or cumulative adverse impact on aquatic reserves.
- 12 With respect to ss 6.8(2), 6.9(2) and 6.10, I respectively accept the advice of parties that: (1) the site is not flood liable land, (2) the proposal will not impact on public access points to natural water bodies and (3) the proposed development is not likely to have a relevant adverse environmental impact relating to downstream catchments.

State Environmental Planning Policy (Housing) 2021

Chapter 2 – Part 2 – Div 1 – In-Fill Affordable Housing

- 13 The DA relies on the in-fill affordable housing provisions in the State Environmental Planning Policy (Housing) 2021 (Housing SEPP).
- 14 The Site is subject to a base maximum floor space ratio (FSR) of 2:1 under the Sutherland Shire Local Environmental Plan 2015 (SSLEP). Section 16(1) of the Housing SEPP permits a proportional uplift to the FSR standard based on the percentage of affordable housing provided. With 15.2% of the gross floor area allocated to affordable housing, the proposal qualifies for a 15.2% FSR bonus, permitting a maximum FSR of 2.6:1. The proposed development achieves an FSR of 2.11:1, which is within the bonus limit.
- 15 Clause 4.3 of the SSLEP 2015 sets a maximum building height of 13 metres for the Site. Under s 16(3) of the Housing SEPP, the development is eligible for a proportional height bonus equal to twice the percentage of affordable housing provided (up to a maximum of 30%). As the proposal includes 15.2% of the gross floor area as affordable housing it qualifies for the maximum 30% height uplift, permitting a maximum building height of 16.9m. The amended development application proposes a maximum building height of 22.96m. As this exceeds both the standard LEP control and the SEPP bonus, the applicant

relies on a Clause 4.6 of SSLEP to justify the exceedance. This is attended to later in this judgement (at [28] and following).

- 16 The parties advise that with respect to s 21 of the Housing SEPP, I can be satisfied that the proposed development will include the required affordable housing component for a period of at least 15 years and to be managed by a registered community housing provider (given a condition of consent has been imposed in accordance with the prescribed condition under s 82 of the Environmental Planning and Assessment Regulation 2021 (NSW) (EPA Regulation)). I accept this advice.

Chapter 4 – Design of Residential Apartment Development

- 17 The parties advise that in respect of residential apartment development, s 29(1) of the EPA Regulation requires that:

a development application that relates to residential apartment development must be accompanied by a statement by a qualified designer.

- 18 Further, s 29(2) of the EPA Regulation requires that:

The statement must—

- (a) verify that the qualified designer designed, or directed the design of, the development, and
- (b) explain how the development addresses—
 - (i) the design principles for residential apartment development, and
 - (ii) the objectives in Parts 3 and 4 of the Apartment Design Guide.

- 19 In addition, the parties refer me to Chapter 4 of the Housing SEPP which applies to new residential flat buildings that are at least 3 or more storeys in height and that contain at least 4 dwellings. Chapter 4 of the Housing SEPP applies to the proposed development.

- 20 Section 147 provides:

(1) Development consent must not be granted to residential apartment development, and a development consent for residential apartment development must not be modified, unless the consent authority has considered the following—

(a) the quality of the design of the development, evaluated in accordance with the design principles for residential apartment development set out in Schedule 9,

(b) the Apartment Design Guide,

(c) any advice received from a design review panel within 14 days after the consent authority referred the development application or modification application to the panel.

21 In relation to each of the matters referenced above, the parties advise that a Design Verification Statement prepared by registered architect Brian Meyerson addresses the requirements of the Housing SEPP and the EPA Regulation.

22 In relation to s 147, the parties confirm that:

- Pursuant to s 147(1)(a), the proposal has been assessed against the 9 design quality principles contained in Schedule 9.
- Pursuant to s 147(1)(b), the proposal has taken into consideration the Apartment Design Guide (ADG), referring to relevant application documentation.
- A design review panel has not been established within the meaning of the Housing SEPP. As such no advice has been received.

23 On this advice, I am satisfied that the requirements of Chapter 4 of the Housing SEPP have been addressed.

Sutherland Shire Local Environmental Plan 2015

24 The site is zoned Zone E1 Local Centre under the applicable Sutherland Shire Local Environmental Plan 2015 (SSLEP). There is no dispute that the proposed development is permissible with consent. I have had regard to the zone objectives and note that the parties believe the proposal, as amended, is consistent with these objectives.

25 Under cl 6.4(3), concerned with stormwater management, consent must not be granted unless, in this instance, the Court is satisfied that the development:

- (a) is designed to maximise the use of water permeable surfaces on the land having regard to the soil characteristics affecting on-site infiltration of water, and
- (b) includes, if practicable, on-site stormwater retention for use as an alternative supply to mains water, groundwater or river water, and
- (c) avoids any significant adverse impacts of stormwater runoff on adjoining properties, native bushland and receiving waters, or if that

impact cannot be reasonably avoided, minimises and mitigates the impact.

- 26 In regard to this, the parties indicated their shared view that each of these pre-requisites are satisfied based on the proposed stormwater and civil engineering strategy prepared by Richmond + Ross (Tab 28 of Class 1 Application) and conditions of consent. I am advised that the design maximises feasible water permeable surfaces, considering the site's soil characteristics and topography. The basement extent would allow for deep soil zones and landscaped areas that support infiltration. On-site stormwater retention measures are incorporated, including detention systems that can be used as an alternative water supply where practicable. Conditions of consent address various particulars, including in relation to the swale and pathway proposed along the northeastern boundary. I accept this advice and I find that the development satisfies the requirements of cl 6.4(3).
- 27 There are a number of other provisions of SSLEP which require consideration by a consent authority, but not jurisdictional findings of the Court in this instance: *McMillan* at [62]-[65]. The parties have advised of their relevant consideration and positive findings with respect to: cl 6.2 (relating to earthworks), 6.15 (relating to energy efficiency and sustainable building techniques) and 6.16 and 6.17 (both relating to urban design).

Contravention of maximum building height development standard

- 28 The DA would contravene the applicable building height standard. Accordingly, the Applicant relies on the cl 4.6 of SSLEP which provides that development consent may be granted even though the development would contravene a development standard, such as is the case here in relation to building height. This facilitative function of cl 4.6 is subject to certain preconditions which I attend to now.
- 29 It is cl 4.6(3) of SSLEP which establishes the essential precondition to the exercise of the function to grant consent even though the development would contravene a development standard:

(3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

(a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and

(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

30 In accordance with the EPA Regulation, the DA, as amended, is accompanied by documentation (Planning Ingenuity 21 October 2025) setting out the grounds upon which the applicant seeks to demonstrate the requirements of cl 4.6(3) have been met notwithstanding the contravention.

31 I will now outline some particulars of the contravention as agreed between the parties and documented in the Planning Ingenuity documentation. Pursuant to cl 4.3 of SSLEP, the Site is subject to a maximum building height of 13m. But, as discussed at [15], the proposed development benefits from the 30% affordable housing height bonus, relating to the Housing SEPP's affordable housing provisions. In turn the applicable building height development standard is 16.9m. There is no breach of the standard with respect to Building A (fronting Strickland Street); however, Buildings B and C (fronting Veno Street) would each contravene the standard. The height of Building B is up to 22.96 (top of skylight). The height of Building C is up to 21.6m (roof top services).

32 Council is satisfied that, with the amendments to the application and given the arguments put in the Planning Ingenuity documentation, the applicant has satisfactorily demonstrated that compliance with the building height standard is unreasonable and unnecessary in the circumstances and there are sufficient environmental planning grounds to justify the contravention of the development standard. It will be seen that I agree with the Council as I make my own findings with respect to this as follows.

33 I find that, through the Planning Ingenuity documentation, the applicant has demonstrated that compliance with the development standard is unreasonable and unnecessary in the circumstances. This is through the Planning Ingenuity documentation working through each of the objectives of cl 4.3 and demonstrating they are relevantly satisfied (Planning Ingenuity pp 10-16). The objectives of cl 4.3 are as follows:

(a) to ensure that the scale of buildings—

(i) is compatible with adjoining development, and

(ii) is consistent with the desired scale and character of the street and locality in which the buildings are located or the desired future scale and character, and

(iii) complements any natural landscape setting of the buildings,

(b) to allow reasonable daylight access to all buildings and the public domain,

(c) to minimise the impacts of new buildings on adjoining or nearby properties from loss of views, loss of privacy, overshadowing or visual intrusion,

(d) to ensure that the visual impact of buildings is minimised when viewed from adjoining properties, the street, waterways and public reserves,

(e) to ensure, where possible, that the height of non-residential buildings in residential zones is compatible with the scale of residential buildings in those zones,

(f) to achieve transitions in building scale from higher intensity employment and retail centres to surrounding residential areas.

- 34 The arguments put by Planning Ingenuity are detailed and extensive but briefly only here they demonstrate objective (a) is satisfied based on the detailing of the characteristics of adjoining development and the comparative exercise undertaken by Planning Ingenuity, considering both the current and desired scale and character and the evaluative framings under relevant case law. The arguments put by Planning Ingenuity demonstrate objective (b) is satisfied based on reference to detailed sunlight access analysis. In particular I note the submissions that the amendments to the application focus particularly on providing for good winter sun access to Veno Street Reserve. The limited overshadowing of neighbouring buildings is also argued convincingly. The arguments put by Planning Ingenuity demonstrate objective (c) is satisfied through demonstration of the privacy and visual intrusion related treatments adopted in the design scheme and that no significant views would be lost as a consequence of the contravention. Overshadowing is considered above. The arguments put by Planning Ingenuity demonstrate objective (d) is satisfied based, again, on the design scheme as amended, including the setting back of non-compliant elements. The arguments put by Planning Ingenuity demonstrate objective (f) is satisfied based on the design configuration which locates taller built form elements in areas where it would have least impact. I

also accept that objective (e) is satisfied given the arguments put in relation to objectives (a) and (f).

- 35 The applicant has demonstrated that there is no need for strict compliance with the standard because the objectives of the clause have been achieved in any event (the first Wehbe “way” under the findings of Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [42]-[43]).
- 36 The applicant has also demonstrated, to my satisfaction, that there are sufficient environmental planning grounds to justify the contravention. This is through the Planning Ingenuity documentation (pp 16-28) which highlights the design features which focus the height contraventions in locations which result in minimisation of amenity impacts, the intended affordable housing provision and the fact that the proposal is well within the applicable floor space ratio controls.

Other provisions of s 4.15(1) of the Environmental Planning and Assessment Act 1979

- 37 The parties have advised me of objecting submissions in relation to the proposal (indeed I heard from a number of objectors during a site inspection prior to the commencement of the conciliation conference). The parties explained to me how consideration has been given to them in coming to the final agreed amended plans. These submissions were summarised in a further document prepared by Planning Ingenuity dated 23 October 2025, which provided commentary with respect to how relevant submissions had been addressed.

Conclusion

- 38 With the above findings, I am satisfied that the jurisdictional prerequisites have been met and the parties’ decision is one that the Court could have made in the proper exercise of its functions. In turn, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties’ decision.
- 39 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, any merit assessment of the issues that were originally in dispute between the parties. Subsection 34(3)(b) of The

LEC Act also requires me to “set out in writing the terms of the decision”. The final orders have this effect.

Notations

- 40 With respect to the amendments of the DA, the Court notes that the Respondent, Sutherland Shire Council, as the relevant consent authority, agrees, under s 38(1) of the Environmental Planning and Assessment Regulation 2021 (NSW), to the Applicant amending Development Application No. 24/0369 to include the documents set out in Annexure B.

Orders

- 41 The Court orders that:

- (1) The Applicant is granted leave to amend Development Application No. 24/0369 in accordance with the plans and documents in Annexure B.
- (2) The Applicant's written request made pursuant to cl 4.6 of the Sutherland Shire Local Environmental Plan 2015 to vary the height of building development standard, prepared by Planning Ingenuity, is upheld.
- (3) The appeal is upheld.
- (4) Development Application No. 24/0369, as amended, for the demolition of existing structures, tree removal, construction of a mixed use development including two buildings being a residential flat building (Building A) containing 53 units and a mixed use building with two wings (Buildings B and C) containing 88 units and tenancies at the lower ground floor and ground floor of Buildings B and C (S2) to accommodate future non-residential uses, intended by the proponent to comprise retail and tavern uses (subject to future assessment and development consent), two basement structures with three levels of basement parking and associated works at 1323-1329 Princes Highway, Heathcote (otherwise known as 1 Veno Street), is determined by the grant of consent, subject to the conditions of consent at Annexure A.
- (5) Order 5 of the short minutes of order made on 22 September 2025 is vacated.
- (6) The Applicant is to pay the Respondent's costs thrown away as a result of the amendment granted leave on 22 September 2025 and the amendment set out in Annexure B in accordance with s.8.15(3) of the *Environmental Planning and Assessment Act 1979* (NSW), in the sum of \$75,000.00 within 90 days of these orders.

P Walsh

Commissioner of the Court

Annexure A (643 KB, pdf)

Annexure B (112 KB, pdf)

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