



Land and Environment Court New South Wales

Medium Neutral Citation:	Ashbury FMBM Pty Limited v Canterbury-Bankstown Council [2021] NSWLEC 1714
Hearing dates:	Conciliation Conference on 9 November 2021
Date of orders:	23 November 2021
Decision date:	23 November 2021
Jurisdiction:	Class 1
Before:	Dickson C
Decision:	See orders at [9]
Catchwords:	DEVELOPMENT APPLICATION – Demolition, site remediation and construction of eight residential flat buildings, ancillary works and civil infrastructure – amended plans – conciliation conference – agreement between the parties – orders
Legislation Cited:	Architects Act 2003 Canterbury Local Environmental Plan 2012, cl 2.7 Environmental Planning and Assessment Act 1979, ss 4.16, 8.7, 4.55 Environmental Planning and Assessment Regulation 2000, cl 50, 115, 143 Land and Environment Court Act 1979, s 34 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004, cl 3 State Environmental Planning Policy No 55—Remediation of Land, cl 7
Texts Cited:	Canterbury Bankstown Community Participation Plan NSW Department of Planning and Environment, Apartment Design Guide, (July 2015)
Category:	Principal judgment
Parties:	Ashbury FMBM Pty Ltd (Applicant) Canterbury Bankstown Council (Respondent)
Representation:	Counsel: I Hemmings (Applicant) M Bonanno (Solicitor) (Respondent) Solicitors: Mills Oakley (Applicant) Canterbury-Bankstown Council (Respondent)
File Number(s):	2021/89891
Publication restriction:	No

JUDGMENT

- 1 **COMMISSIONER:** This appeal is brought under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) following the deemed refusal by Canterbury Bankstown Council (the Respondent) of development application DA 826/2020. The development application seeks consent for demolition, remediation, tree removal, civil infrastructure including roads, and construction of nine residential towers over basement carparking. The development is proposed at 149-163 Milton Street, Ashbury (Lots B & C DP 30778).
- 2 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 9 November 2021. I presided over the conciliation conference.
- 3 At the conciliation conference, an agreement, under s 34(3) of the *Land and Environment Court Act 1979* (LEC Act), was reached between the parties as to the terms of a decision in the proceedings that was acceptable to the parties on the basis of amended plans. A signed agreement prepared in accordance with s 34(10) of the LEC Act was filed with the Court on 17 November 2021.
- 4 On 1 October 2021, by notice of motion the Applicant amended the development application with the agreement of the Respondent as the relevant consent authority under cl 55(1) of the Environmental Planning and Assessment Regulation 2000 (Regulation). The Court has been notified that the amended modification application has been lodged on the NSW planning portal. As such the requirements of cl 121B of the Regulation are met.
- 5 The development application, as amended, seeks approval for:
- a. Demolition of existing buildings
 - b. Site remediation works;
 - c. Civil infrastructure and new road;
 - d. Removal of 50 trees;
 - e. Site landscaping works, including 171 new trees;
 - f. Basement car parking, accommodating parking for 251 vehicles;
 - g. Construction of 8 residential buildings, including:
 - i. A part 5 and part 6 storey residential building, accommodating 2 x 1 bedroom, 9 x 2 bedrooms, 21 x 3 bedrooms and 261 square metres of communal open space
 - ii. A part 4, part 5 storey residential flat building accommodating 11 x 1 bedroom, 7 x 2 bedrooms and 15 x 3 bedrooms and 279 square metres of communal open space
 - iii. 50 x 2/3 storey townhouses, each comprising of 3 bedrooms.
 - iv. 12 x 2 storey townhouses, each comprising of 3 bedrooms.
 - h. Total of 251 car parking spaces, including 226 residential spaces (13 being accessible) and 25 visitor spaces (1 of which is accessible);
 - i. 39 bicycles spaces, including 26 residential bicycle spaces within the basement level and 13 visitor bicycles spaces on ground level
- 6 As the presiding Commissioner, I am satisfied that the decision is one that the Court can make in the proper exercise of its functions (this being the test applied by s 34(3) of the LEC Act). I have formed this state of satisfaction for the following reasons:
- (1) Landowners consent was provided by the owner of the land at the time of the lodgement of the Development Application.
 - (2) Consistent with the requirements of cl 7 of State Environmental Planning Policy No 55—Remediation of Land I have given consideration to the potential contamination of the land. As part of the Development Application the Applicant has prepared a Detailed Site Investigation Report and a Remediation Action Plan. On the basis of these reports I am satisfied firstly, that the land requires

remediation to be made suitable for the residential use proposed to be carried out, and secondly I am satisfied that the land will be remediated before the site is used for that purpose.

- (3) Consistent with cl 3 of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004, an updated BASIX certificate has been submitted.
- (4) As the development application is for residential apartment development, the provisions of the State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65) apply. Clause 28 of SEPP 65 requires a consent authority, or the Court on appeal, to take into consideration advice from the design review panel, and the design quality of the development when evaluated in accordance with the design quality principles, and the Apartment Design Guide. I have reviewed the amended development application against these provisions, and I am satisfied that that adequate regard has been given to the design quality principles at Schedule 1, and the objectives specified in the Apartment Design Guide.
- (5) Clause 50(1A) of the Regulation requires an application for residential apartment development to be accompanied by a statement by a qualified designer, defined by cl 3 as a person registered under the *Architects Act 2003*, and in a form set out at cl 50(1AB) of the EPA Regulation. The statement by the qualified designer must attest to certain things set out at cl 3A of the Regulation, including attestations in respect of the design quality principles, and the objectives specified in the Apartment Design Guide for the relevant design criteria. A complying design statement prepared by the architect John Pradel and Adam Haddow of SJB Architects NSW accompanies the application.
- (6) The site is zoned R4 High Density Residential pursuant to the Canterbury Local Environmental Plan 2012 (LEP 2012). The proposed development of a residential flat building is permissible with consent in the zone. Demolition is permissible pursuant to cl 2.7 of LEP 2012.
- (7) The proposed development is compliant with the development standards in LEP 2012.
- (8) The original application was notified in accordance with the relevant development control plan and the submissions have been considered.

7 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.

8 In making the orders to give effect to the agreement between the parties, the parties have not raised, and I am not aware of any jurisdictional impediment to the making of these orders. Further, I was not required to make, and have not made, any assessment of the merits of the development application against the discretionary matters that arise pursuant to an assessment under s 4.15 of the EPA Act.

9 The Court Notes:

- (1) That Canterbury Bankstown Council as the relevant consent authority has agreed, under cl 55(1) of the Environmental Planning and Assessment Regulation 2000, to the Applicant amending development application DA 826/2020.
- (2) The Applicant has uploaded the amended application on the NSW planning portal.
- (3)

The Applicant is to file the amended application with the Court by 17 November 2021.

10 The final orders to give effect to the parties' agreement under s 34(3) of the Court are:

- (1) That the appeal is upheld.
- (2) Development Application No 826/2020 for the following development:
 - (a) Demolition of existing buildings;
 - (b) Site remediation works;
 - (c) Civil infrastructure and new road;
 - (d) Removal of 50 trees;
 - (e) Site landscaping works, including 171 new trees;
 - (f) Basement car parking, accommodating parking for 251 vehicles;
 - (g) Construction of 8 residential buildings, including:
 - (i) A part 5 and part 6 storey residential building, accommodating 2 x 1 bedroom, 9 x 2 bedrooms, 21 x 3 bedrooms and 261 square metres of communal open space;
 - (ii) A part 4, part 5 storey residential flat building accommodating 11 x 1 bedroom, 7 x 2 bedrooms and 15 x 3 bedrooms and 279 square metres of communal open space;
 - (iii) 50 x 2/3 storey townhouses, each comprising of 3 bedrooms;
 - (iv) 12 x 2 storey townhouses, each comprising of 3 bedrooms;
 - (v) Total of 251 car parking spaces, including 226 residential spaces (13 being accessible) and 25 visitor spaces (1 of which is accessible);
 - (vi) 39 bicycles spaces, including 26 residential bicycle spaces within the basement level and 13 visitor bicycles spaces on ground level;
 - (h) Total of 251 car parking spaces, including 226 residential spaces (13 being accessible) and 25 visitor spaces (1 of which is accessible);
 - (i) 39 bicycles spaces, including 26 residential bicycle spaces within the basement level and 13 visitor bicycles spaces on ground level.

at 149-163 Milton Street Ashbury, is approved subject to the conditions at Annexure A.

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D M Dickson

Commissioner of the Court

[Annexure A \(335955,.pdf\)](#)

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Decision last updated: 23 November 2021