



Land and Environment Court New South Wales

Medium Neutral Citation:

**Costas v Canterbury Bankstown Council [2022]
NSWLEC 1262**

Hearing dates:

Conciliation conference held 28 March 2022, 26 April 2022
and 3 May 2022, final agreement filed 6 May 2022

Date of orders:

27 May 2022

Decision date:

27 May 2022

Jurisdiction:

Class 1

Before:

Pullinger AC

Decision:

The Court orders that:

- (1) Leave is granted to the Applicant to amend
Development Application DA-503/2018 and rely on the
amended plans and documents listed at condition 1 of
Annexure A.
- (2) Pursuant to section 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
amending the Development Application in the agreed
sum of \$5,000.
- (3) The Applicant's written request, pursuant to clause 4.6
of the Canterbury Local Environmental Plan 2012
(CLEP), seeking to vary the development standard for
height of buildings as set out at clause 4.3 of the CLEP,
is upheld.
- (4) The appeal is upheld.
- (5) Consent is granted to Development Application DA-
503/2018 (as amended) for the demolition of existing
structures and construction of an eight-storey shop-top
development comprising of 61 residential apartments,
restaurants and a commercial tenancy above four
levels of basement parking at 41 Broadarrow Road,
Narwee, subject to the conditions of consent contained
at Annexure A.

Catchwords:

DEVELOPMENT APPLICATION – shop-top housing development – cl 4.6 written request – height of buildings – agreement between the parties – orders

Legislation Cited:

Canterbury Local Environmental Plan 2012, cll 4.3, 4.6, 5.10, 6.1, 6.2, 6.4
Environmental Planning and Assessment Act 1979, ss 4.15, 8.7, 8.15
Environmental Planning and Assessment Regulation 2021, cl 29
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy (Transport and Infrastructure) 2021, cl 2.98
State Environmental Planning Policy (Resilience and Hazards) 2021, cl 4.6
State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

Texts Cited:

Land and Environment Court of New South Wales, COVID-19 Pandemic Arrangements Policy (February 2022)

Category:

Principal judgment

Parties:

Loulla Costas (Applicant)
Canterbury-Bankstown Council (Respondent)

Representation:

Counsel:
G Shapiro (Solicitor) (Applicant)
M Bonanno (Solicitor) (Respondent)

Solicitors:
Hones Lawyers (Applicant)
Canterbury-Bankstown Council (Respondent)

File Number(s):

2021/325492

Publication restriction:

No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of Development Application DA-503/2018 (the DA) by Canterbury-Bankstown Council (the Respondent). The DA sought consent for the demolition of existing structures and construction of an eight-storey shop-top housing development comprising 62 residential apartments, restaurants and a commercial tenancy above four levels of basement parking at 41 Broadarrow Road, Narwee (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 28 March 2022, 26 April 2022 and 3 May 2022. I presided over the conciliation conference.
- 3 Consistent with the Court's COVID-19 Pandemic Arrangements Policy, published on 1 December 2021, and at the request of the parties, the matter was conducted by Microsoft Teams.
- 4 During the conciliation conference, the parties reached agreement as to the terms of a decision in these proceedings that would be acceptable to the parties. The agreement involves the Court upholding the appeal and granting development consent to an amended DA, subject to conditions.
- 5 Whilst the amended DA remains largely the same as the original proposal, a series of design changes and the provision of additional information has cumulatively resolved the contentions initially raised by the Respondent, which in turn related to site remediation, traffic and parking, waste management and poor internal amenity design, amongst other contentions.
- 6 Of particular note, the amended DA has been reconfigured internally to now improve the residential amenity available to a number of apartments. Waste management and circulation arrangements have been refined and traffic sight lines amended. The final amended DA now comprises a total of 61 apartments above two ground floor restaurants, a retail tenancy and commercial tenancy.
- 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 amended DA.
- 8 There are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 9 In that regard, I am satisfied the DA was made with the consent of the owner of the land, evidenced within the Class 1 Application accompanying this matter.
- 10 The DA was publicly notified for 28 days from 16 January 2019 until 7 February 2019. No submissions were received by the Respondent. Accordingly, I am satisfied that s 4.15(1)(d) of the EPA Act has been appropriately addressed.
- 11 The parties agree, and I am satisfied, that the Canterbury Local Environmental Plan 2012 (CLEP) is a relevant environmental planning instrument. The site is zoned B2 Local Centre and the proposed development - characterised as shop-top housing - is permissible with consent and that the amended DA achieves the objectives of the B2 zone.
- 12 The parties agree, and I am satisfied, that all principal development standards of the CLEP have been met by the amended DA, with the exception of cl 4.3 - Height of buildings - which establishes a maximum building height of 27m for the site.

In such an instance, cl 4.6(3) of the CLEP requires consideration of a written request from the Applicant demonstrating that compliance with this development standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.

- 14 Clause 4.6(4) of the CLEP requires the consent authority to be satisfied the Applicant's written request has adequately addressed the matters required by cl 4.6(3), and the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard and the objectives for development within the zone in which the development is proposed to be carried out.
- 15 Additionally, cl 4.6(4)(b) of the CLEP requires the concurrence of the Planning Secretary be obtained, while cl 4.6(5) requires the Planning Secretary to consider whether, in granting this concurrence, the proposed contravention of the development standard raises any matters of significance for State environmental planning, the public benefits of maintaining the standard, and any other matters required to be considered by the Planning Secretary.
- 16 As required by cl 4.6 of the CLEP, the Applicant has provided a written request (prepared by SJB Planning and dated 18 November 2020) seeking to vary the height of building development standard.
- 17 The parties agree, and I am satisfied, that this written request adequately justifies the variance to the height of building development standard for the following reasons.
- 18 The objectives of the CLEP B2 Local Centre land use zone include providing for 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, and to maximise public transport patronage and encourage walking and cycling. The parties agree, and I am satisfied, the amended DA meets these objectives.
- 19 The objectives of cl 4.3 of the CLEP seek to ensure that development establishes and maintains the desirable attributes and character of an area, and minimises overshadowing and to support building design that contributes positively to the streetscape and visual amenity of an area. The parties agree, and I am satisfied, the amended DA meets these objectives.
- 20 The amended DA exceeds the height of buildings development standard of 27m by approximately 1.71m, equating to an exceedance of 6.33% at the greatest extent.
- 21 The DA has been amended to resolve the contentions previously raised by the Respondent, and in particular has now been reconfigured internally to improve internal amenity, safe traffic movement and effective waste management. The areas of height exceedance represent a small portion of the total site area and proposed building volume, they are located towards the centre of the site and are associated with lift overruns and mechanical plant area screening. The height exceedance is generally not

visible from surrounding public vantage points. I am also satisfied the variation to height of building brings with it no material environmental impacts or additional overshadowing.

22 Consequently, I am satisfied the Applicant's cl 4.6 written request adequately justifies the proposed variations to height of buildings.

23 The parties agree, and I am satisfied, that the site does not contain a heritage item pursuant to cl 5.10 - Heritage conservation - of the CLEP and is not within a heritage conservation area. The site is, however, within the vicinity of a heritage item (being the Narwee Railway Station). Assessment of the amended DA has had regard to the impact of the proposal upon the heritage item as required by cl 5.10(5). The assessment concludes that the proposal will not detract from the heritage significance of the adjoining heritage item.

24 The parties agree, and I am satisfied, that pursuant to cl 6.1 - Acid sulfate soils - of the CLEP, the site is not located within a mapped acid sulfate soils area.

25 The parties agree, and I am satisfied, that pursuant to cl 6.2 - Earthworks - of the CLEP, the Applicant has provided a number of technical reports addressing the matters for consideration set out in cl 6.2(3). Conditions of consent have been imposed to ensure their implementation. The reports include:

- (a) Ground Engineering Desk Study prepared by Wood & Grieve Engineers dated 8 November 2018
- (b) Preliminary Stage 2 Environmental Site Assessment prepared by Environmental Investigation Services dated 5 November 2019
- (c) Erosion and Sediment Control Plans (Revision B) prepared by Wood & Grieve Engineers dated 18 November 2019
- (d) Preliminary (Stage 1) Site Investigation prepared by JK Geotechnics dated 13 April 2021
- (e) Remediation Action Plan prepared by eiAustralia dated 3 March 2022
- (f) Detailed Site Investigation prepared by eiAustralia dated 22 February 2022
- (g) Site Audit Statement prepared by Geosyntec dated 7 March 2022
- (h) Site Audit Report prepared by Geosyntec dated 7 March 2022

26 The parties agree, and I am satisfied, that the amended DA meets the requirements of cl 6.4 - Stormwater management - of the CLEP. The Applicant has provided a Civil Stormwater Management Report prepared by Wood & Grieve Engineers dated 12 November 2018 addressing the matters for consideration set out in cl 6.4(3). Conditions of consent have been imposed to ensure implementation of the report.

27

The parties agree, and I am satisfied, that State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience and Hazards) is an additional relevant environmental planning instrument. Having regard to the technical reports prepared by the Applicant (and referred to earlier in this judgment), the parties agree the land will be made suitable for the proposed development following its remediation. Conditions of consent have been imposed to ensure their implementation. Accordingly, I am satisfied the amended DA addresses the matters outlined in cl 4.6 of SEPP Resilience and Hazards.

28 The parties agree, and I am satisfied, that State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP Transport and Infrastructure) is an additional relevant environmental planning instrument. The site is located adjacent to Narwee Train Station and a rail corridor. Notice of the DA was provided to Sydney Trains, which provided comments to the Respondent. Sydney Trains' comments have been reflected through the imposition of conditions of consent. I am satisfied this meets the requirements of cl 2.98 of SEPP Transport and Infrastructure.

29 The parties agree, and I am satisfied, that the amended DA is subject to the provisions of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX). A BASIX certificate dated 19 April 2022 has been submitted with the DA (as amended). Conditions of consent are imposed to ensure compliance with the BASIX certificate.

30 The parties agree, and I am satisfied, that the amended DA is subject to the provisions of State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65). Pursuant to the provisions of the Environmental Planning and Assessment Regulation 2021 (EPA Reg), the Applicant's architect, Connie Argyrou (NSW registered architect 7,031), has prepared a Design Verification Statement, fulfilling the requirements of cl 29 of the EPA Reg.

31 Having considered each of the preceding jurisdictional requirements, and having formed the necessary view required by s 34(3) of the LEC Act, I find it is appropriate to make the orders agreed to by the parties and now dispose of the matter.

32 The Court notes that:

- (1) The Applicant has amended the DA with the consent of the Respondent.
- (2) The amended DA was uploaded to the NSW Planning Portal on 3 May 2022.
- (3) The Applicant has filed the amended DA with the Court on 6 May 2022.

Orders

33 The Court orders that:

- (1) Leave is granted to the Applicant to amend Development Application DA-503/2018 and rely on the amended plans and documents listed at condition 1 of Annexure A.

- (2) Pursuant to section 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 amending the Development Application in the agreed sum of \$5,000.
- (3) The Applicant's written request, pursuant to clause 4.6 of the Canterbury Local Environmental Plan 2012 (CLEP), seeking to vary the development standard for height of buildings as set out at clause 4.3 of the CLEP, is upheld.
- (4) The appeal is upheld.
- (5) Consent is granted to Development Application DA-503/2018 (as amended) for the demolition of existing structures and construction of an eight-storey shop-top development comprising of 61 residential apartments, restaurants and a commercial tenancy above four levels of basement parking at 41 Broadarrow Road, Narwee, subject to the conditions of consent contained at Annexure A..

.....

M Pullinger

Acting Commissioner of the Court

([Annexure A](#))([369758](#),.pdf).

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 27 May 2022