Land and Environment Court

New South Wales

Case Name:	Chriroseph Pty Ltd v Northern Beaches Council
Medium Neutral Citation:	[2020] NSWLEC 1502
Hearing Date(s):	Conciliation conference on 19 August, 10 September, 22 September and 30 September 2020
Date of Orders:	22 October 2020
Decision Date:	22 October 2020
Jurisdiction:	Class 1
Before:	Horton C
Decision:	See orders at [10]
Catchwords:	DEVELOPMENT APPLICATION – aged care facility – agreement between the parties – conciliation conference – orders
Legislation Cited:	Environmental Planning and Assessment Act 1979 Land and Environment Court Act 1979 Rural Fires Act 1997 State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 State Environmental Planning Policy No 55—Remediation of Land Warringah Local Environmental Plan 2000 Warringah Local Environmental Plan 2011
Category:	Principal judgment
Parties:	Chriroseph Pty Ltd (Applicant) Northern Beaches Council (Respondent)
Representation:	Counsel: C Ireland (Applicant) S Patterson (Solicitor) (Respondent)

Solicitors:
Dentons (Applicant)
Wilshire Webb Staunton Beattie (Respondent)

File Number(s): 2020/137970

Publication Restriction: No

JUDGMENT

1 **COMMISSIONER**: This Class 1 appeal concerns a development application brought before the Court under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of Development Application DA2018/1654 by the Sydney North Planning Panel on behalf of Northern Beaches Council (the Respondent) seeking consent for demolition works and construction of a new aged care facility comprising 100 rooms (including a dementia ward, a café, staff areas, a kitchen and basement parking (the proposed development) at 181 Forest Way, Belrose (the site).

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 19 August 2020. I presided over the conciliation conference.

3 At the conciliation conference, the parties reached in principle 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 conditional development consent to the development application.

4 I adjourned the conciliation conference on a number of occasions to permit the amendment of the plans in accordance with the terms of the agreement, and in order for the conditions to be settled and finally agreed.

5 A signed agreement prepared in accordance with s 34(10) of the LEC Act was filed with the Court on 29 September 2020.

6 The parties ask me to approve their decision as set out in the s34 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 s34 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 explained to me during the conference as to how the requirements of the relevant environmental planning instruments have been satisfied in order to allow the Court to make the agreed orders at [10]. I formed an opinion of satisfaction that each of the pre-jurisdictional requirements identified by the parties have been met, for the following reasons:

(1) The site is located within an area identified as 'Deferred Lands' by cl 1.3(1A) of the Warringah Local Environmental Plan 2011 (WLEP 2011), and so the provisions of the Warringah Local Environmental Plan 2000 (WLEP 2000) apply with particular respect to the B2 Oxford Falls Valley Locality.

(2) The proposed development is classified as 'Category Two – Housing for older people or people with disabilities', in Appendix B WLEP 2000 Narrabeen Lagoon Catchment Locality Statements and so is a permissible use subject to consent.

(3) In respect of cl 12(1)(a) of the WLEP 2000, I am satisfied that the development is consistent with relevant principles of development control in Part 4 for the following reasons:

- In accordance with cl 40 'Housing for older people or people with disabilities', equitable access to support services is provided and complying wheelchair access is evident.
- On the basis of the report prepared by Howard Moutrie dated 4 November 2019, and the proposed conditions of consent, I consider the requirements contained in Schedule 16 of the WLEP 2000 to be achieved.

(4) In respect of cl 12(1)(b) of the WLEP 2000, on the basis of the content in the Council's assessing officer's report, I am satisfied that the proposed development is consistent with the relevant provisions of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors SEPP).

(5) Clause 12(2)(b) of the WLEP 2000 requires that I must be satisfied that the development complies with development standards set out in the B2 Oxford Falls Valley Locality statement, which is found in Appendix B of the WLEP 2000. I am satisfied that the development standards are complied with, with the exception of building height and the front setback to Forest Way.

- In respect of building height, I note that the maximum height of the proposed development is 9.38m which exceeds the height standard by 830mm. However, cl 20(1) of the WLEP 2000 permits even if the development does not comply with one or more development standards,

provided the resulting development is consistent with the general principles of development control, the desired future character of the locality and any relevant State environmental planning policy. On the basis of the report prepared by the Respondent’s assessing officer, and the agreement of the parties, I am satisfied that the requirements of cl 20(1) are achieved.

- In respect of the front setback to Forest Way, I am satisfied on the basis of the drawings that the required setback is substantially complied with, and that the front setback is densely landscaped and that carparking is minimised.

(6) Clause 12(3)(b) of the WLEP 2000 requires that development classified as Category 2 be consistent with the desired future character described in the relevant Locality Statement. I note Council’s assessment officer considers the development to be low intensity and low impact as a result of its massing, use of landscaping and substantial side setbacks. Further, I note that the development will not disrupt the skyline when viewed from Narrabeen Lagoon or the Wakehurst Parkway. On this basis, I am satisfied that the proposed development is consistent with the desired future character of the locality.

(7) On the basis of the grounds advanced by the parties, I am satisfied in respect of those matters set out at cl 7 of State Environmental Planning Policy No 55—Remediation of Land.

(8) The proposed development is integrated development as it requires the concurrence from, relevantly, the New South Wales Rural Fire Service (the RFS) in accordance with s 4.46 of the EPA Act.

(9) The RFS has not provided general terms of approval however as the proposed development is defined by s 100B(6)(f) of the *Rural Fires Act 1997*, as being of a Special Fire Protection Purpose, the exclusion at subs 4.14(1) of the EPA Act applies.

(10) That said, s 4.46 of the EPA Act requires a bushfire safety authority by reference to s 100B of the *Rural Fires Act 1997*, and s 4.47 of the EPA Act prohibits the grant of consent in the absence of general terms of approval.

(11) This prohibition is overcome by s 39(6) of the LEC Act which provides the Court with power to determine an appeal whether or not the concurrence or approval has been granted.

(12) I am satisfied that there is power for the Court to determine the matter, and I am satisfied that consent can be granted to the development. In arriving at this state of satisfaction, I accept and rely upon the agreement of the bushfire experts that is set out in writing and which is re-produced below:

> “We, the parties’ bushfire experts, agree that if we were standing in the shoes of the Commissioner for the purposes of Section 100B of the Rural Fires Act 1997, we would issue a bushfire safety authority under s 100B for the proposed development. In our opinion:

> The proposed development complies with the performance criteria as outline [sic] in Planning for Bushfire Protection.
>
> The amended bushfire report prepared by John Travers (Travers bushfire & ecology) dated September reflects the requirements of PBP and also reflects the matters agreed by the experts.
>
> During the on-site section 34 conciliation conference, the owner of No.179 agreed that he would comply with the development consent and approved plans for No.179. This means that any revegetation of that land, otherwise than in accordance with the approved plans, is not possible without a development application being lodged with Council and the RFS. The experts agree there is no bushfire risk arising from No.179, to the proposed development and its insitu APZ's, and the bushfire report prepared by John Travers originally in November 2019 (also contained in the amended report dated September 2020) is an accurate assessment of the vegetation at No.179."

8 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.

9 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.

10 The final orders to give effect to the parties' agreement under s 34(3) of the *Land and Environment Court Act 1979* are:

(1) The Applicant is given leave to amend its application to rely on the amended plans and further documents referred to below:

Architectural plans:		
DA050 Revision J	21 August 2020	Morrison Design Partnership Pty Ltd
DA101 Revision L	7 September 2020	Morrison Design Partnership Pty Ltd
DA102 Revision K	7 September 2020	Morrison Design Partnership Pty Ltd

DA103 Revision K	7 September 2020	Morrison Design Partnership Pty Ltd
DA104 Revision K	7 September 2020	Morrison Design Partnership Pty Ltd
DA105 Revision D	18 November 2019	Morrison Design Partnership Pty Ltd
DA200 Revision F	7 September 2020	Morrison Design Partnership Pty Ltd
DA201 Revision F	7 September 2020	Morrison Design Partnership Pty Ltd
DA300 Revision E	7 September 2020	Morrison Design Partnership Pty Ltd
Reports/ other documents:		
Bushfire Protection Assessment, Ref: 18MORR02	9 September 2020	Travers bushfire & ecology (John Travers)
Joint statement prepared by John Travers and Lew Short	17 September 2020	John Travers (acting for the Applicant) and Lew Short (for the Council)

(2) The Applicant is to pay the Respondent's costs "thrown away" by the amendment of its application pursuant to s 8.15 of the *Environmental*

Planning and Assessment Act 1979 in the amount of $5,000 payable within 28 days of the date of these orders.

(3) The appeal is upheld.

(4) Development Application DA2018/1654 for the demolition works and construction of a new aged care facility comprising 100 rooms (including a dementia ward (a café, staff areas, a kitchen and basement parking at 181 Forest Way, Belrose ("the site") is approved, subject to the conditions of consent at Annexure A.

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T Horton

Commissioner of the Court

Annexure A (314740, pdf)

Plans (16882402, pdf)

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Amendments

22 October 2020 - Correction to administrative error.

22 October 2020 - Correction to cover sheet.

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