



Land and Environment Court
New South Wales

Case Name: East Coast Property Development Pty Ltd ATF East Coast Property Development Unit Trust v Northern Beaches Council

Medium Neutral Citation: [2024] NSWLEC 1302

Hearing Date(s): Conciliation Conference on 31 May 2024

Date of Orders: 05 June 2024

Decision Date: 5 June 2024

Jurisdiction: Class 1

Before: Espinosa C

Decision: The Court orders:
(1) The appeal is upheld.
(2) Development consent DA2021/1805 is modified in the terms in Annexure A.
(3) Development consent DA2021/1805 as modified by the Court is Annexure B.

Catchwords: DEVELOPMENT APPEAL – modification of consent – seniors living – conciliation conference – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, s 4.55
Land and Environment Court Act 1979, s 34
Environmental Planning and Assessment Regulation 2021, s 113
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, cl 15
State Environmental Planning Policy (Housing) 2021, Ch 4, Sch 7A, s 2

State Environmental Planning Policy (Sustainable Buildings) 2022, s 4.2
State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development
Warringah Local Environmental Plan 2011, cl 5.21

Cases Cited: East Coast Property Development Pty Ltd ATF East Coast Property Development Unit Trust v Northern Beaches Council [2022] NSWLEC 1305

Category: Principal judgment

Parties: East Coast Property Development Pty Ltd ATF East Coast Property Development Unit Trust (Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
G McKee (Solicitor)(Applicant)
S Patterson (Solicitor)(Respondent)

Solicitors:
McKees Legal Solutions (Applicant)
Wilshire Webb Staunton Beattie Lawyers (Respondent)

File Number(s): 2023/238892

Publication Restriction: Nil

JUDGMENT

1 **COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 4.55(8) of the *Environmental Planning and Assessment Act 1979* (EPA Act) being an application MOD2023/0416 filed with the Court seeking approval to modify DA2021/1805 being a consent for the demolition of a dwelling house and associated structures on site, site preparation works including excavation and the removal of trees (8 exempt species and one other tree) and the construction of a part two storey, part three storey seniors housing development containing 5 self-contained dwellings in a residential flat building arrangement over a basement level containing parking for 9 vehicles (the Consent) at 4 Alexander Street, Collaroy legally described as Lot A in DP 379308 (the Site).

- 2 During the course of these proceedings, the modification application has been amended to modify the conditions related to carparking standards to acknowledge the reduced blind isle width.
- 3 The Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which has been held firstly on 15 January 2024 presided by Dickson C and then on 31 May 2024. I presided over the conciliation conference on 31 May 2024.
- 4 At the conciliation conference, the parties reached 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 approving the modification to the Consent subject to conditions.
- 5 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. 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.
- 6 The parties' decision involves the Court exercising the function under s 4.55 of the EPA Act to approve the modification of a consent.
- 7 There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties identified the jurisdictional prerequisites of relevance in these proceedings to be the terms of s 4.55 of the EPA Act to modify a consent. The parties explained how the jurisdictional prerequisites have been satisfied in a joint jurisdictional note.
- 8 The Court granted the Consent in *East Coast Property Development Pty Ltd ATF East Coast Property Development Unit Trust v Northern Beaches Council* [2022] NSWLEC 1305.
- 9 Section 4.55(8) of the EPA Act provides as follows:

(8) **Modifications by the Court** The provisions of this section extend, subject to the regulations, to enable the Court to modify a consent granted by it but, in the extension of those provisions, the functions imposed on a consent

authority under subsection (1A)(c) or subsection (2)(b) and (c) are to be exercised by the relevant consent authority and not the Court.

- 10 Pursuant to s 4.55(2)(a) of the EPA Act, the Court, as consent authority may modify the Consent if it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all).
- 11 The modification application seeks approval to modify the Consent for refinement in the architectural, landscape, stormwater and flood management detailing of the approved development to enhance internal layout efficiency, serviceability and constructability. Such modifications include a lower basement storage area, a minor increase in overall building height to facilitate the provision of required services, the provision of two plunge pools at the rear of the Site and the removal of the flood gate from the driveway based on the findings of further flood modelling.
- 12 The Court is satisfied that the development to which the consent as modified relates is substantially the same development for which consent was originally granted and I adopt the reasons given in the Statement of Environmental Effects prepared by Greg Boston of Boston Blyth Fleming Town Planners dated 18 July 2023 at pp 5 to 6 which provides as follows:

“When one undertakes the above [comparative] analysis in respect of the subject application it is clear that the approved development remains, in its modified state, a development which will continue to relate to its surrounds and adjoining development in a similar fashion as originally approved in terms of streetscape, design quality, view sharing height, boundary setbacks, privacy and landscape outcomes.

...

The proposed use does not change,

The overall design quality of the development is not compromised nor its contribution to the streetscape,

The external building appearance, envelope and volume as perceived from adjoining properties and the public domain are not significantly altered,

The modifications maintain the previously approved residential amenity outcomes in terms of view, privacy, visual bulk and overshadowing, and

The development continues to be safe from flooding hazard.”

- 13 Pursuant to s 4.55(c) of the EPA Act, the Respondent sets out in the Statement of Facts and Contentions (SOFAC) filed 28 September 2023 at p 4 that as a result of the notification to 145 adjoining properties between 2 August 2023 and 23 August 2023, the Respondent received 6 submissions raising a number of issues listed in the SOFAC.
- 14 In addition, 2 objectors presented on site at the first conciliation conference before Commissioner Dickson on 15 January 2024 raising concerns primarily about acoustic and visual privacy resulting from the proposed changes to the fence, landscaping and addition of the plunge pools. In response, the modification application has been amended by shifting the top level to minimise impacts on loss of solar access and view for neighbours and the top of the rear boundary fence as proposed maintains a constant reduced level (RL) to improve privacy for the rear neighbours. These changes can be seen in drawing DA101. The Applicant has also included additional landscaping at the penthouse level in order to soften the presentation to adjoining neighbours as can be seen in drawing DA102.
- 15 I am satisfied that the submissions received have been taken into consideration by the parties in formulating the agreement.
- 16 The parties have identified other jurisdictional prerequisites of relevance for the Court to be satisfied to approve the modification. I set these out below.
- 17 The State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65) was repealed on 14 December 2023. The relevant matters dealt with by SEPP 65 are largely transferred to Ch 4 of State Environmental Planning Policy (Housing) 2021 (SEPP Housing). The modification application is saved by the general savings provision under Sch 7A, s 2 of the SEPP Housing and SEPP 65 continues to apply to the modification application. A Design Verification Statement required by SEPP 65 was prepared by Paul Buljevic (NSW Registered Architect No 7768), dated 23 June 2023 and was filed with the Class 1 Application at Tab 12 and it concludes that the development:

“Achieves the design principles set out in the State Environmental Planning Policy no. 65,

The objectives of the Apartment Design Guide are achieved in the modified development, and

The modifications do not diminish or detract from the design quality, or compromise the design intent, of the development for which the development consent was granted.”

- 18 Accordingly, the Court as the consent authority is satisfied that the development achieves the design principles set out in SEPP 65.
- 19 The Land Use Table of the Warringah Local Environmental Plan 2011 (WLEP) provides that the Site is zoned R2 Low Density Residential where the Consent is characterised as “Seniors Housing”, which is prohibited in the R2 zone. The Consent was permissible pursuant to the cl 15(a) of the now repealed State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP Seniors).
- 20 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 continues to apply to the Development Application by operation of s 4.2(1)(a) of the State Environmental Planning Policy (Sustainable Buildings) 2022 and the modification application is supported by BASIX Certificate No 1232829M_02 issued by Aspire Sustainability Consulting Pty Ltd and dated 7 July 2023. This certificate confirms that the project passes the BASIX requirements.
- 21 The Site is not identified as a flood prone land, however historically the intersection of Alexander Street and Pittwater Road (south east of the Site) is known for localised ponding in major storm events due to the roads existing sag point. The Site is impacted by two overland flow paths and is subject to localised flooding. The modification application proposes the removal of the flood gate that was approved in DA2021/1805. The modification application effectively manages the overland flow by way of additional drainage at the rear of the site and drainage along the boundary walls.
- 22 The acceptability of the proposal having regard to the flooding affectation across the site is addressed in the accompanying Overland Flow Assessment Report prepared by Woolacotts Consulting Engineers dated 30 June 2023 filed with the Class 1 Application on 27 July 2023 at Tab 14. The development will

remain safe from flooding hazard and remains compliant with cl 5.21 of the WLEP.

- 23 The Court can be satisfied that the modification application manages flood impacts and that the proposal satisfies cl 5.21.
- 24 I am satisfied that the parties' decision is one that the Court could have made in the proper exercise of its functions, as required by s 34(3) of the LEC Act. I adopt the reasons given by the parties as set out in this judgment.
- 25 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.

Notations:

26 The Court notes:

- (1) That the Respondent as the relevant consent authority has agreed under Section 113(4) of the Environmental Planning and Assessment Regulation 2021, to the Applicant amending Modification Application No Mod2023/0416 filed with the Court on 27 July 2023 in accordance with the plans and documents listed below:

(a) Architectural Plans, prepared by PBD Architects

| Drawing No. | Drawing Title | Issue | Date |
|--------------------|----------------------|--------------|-------------|
| DA002 | Site Plan | D | 29/02/2024 |
| DA050 | Basement Plan | C | 29/02/2024 |
| DA100 | Ground Floor Plan | G | 29/02/2024 |
| DA101 | Level 1 Plan | G | 29/02/2024 |
| DA102 | Level 2 Plan | E | 29/01/2024 |
| DA103 | Roof Plan | E | 29/01/2024 |
| DA200 | Elevations 01 | E | 29/01/2024 |

| | | | |
|-------|-----------------------------|---|------------|
| DA201 | Elevations 02 | E | 29/01/2024 |
| DA202 | Southern Boundary Interface | D | 29/01/2024 |
| DA300 | Section A and B | F | 29/02/2024 |
| DA301 | Boundary Condition Study | C | 29/01/2024 |

(b) Landscape Plans prepared by Conzept Landscape Architects

| Drawing No. | Drawing Title | Issue | Date |
|--------------------|----------------------|--------------|-------------|
| LP-S4.55-1 | Sheet 1 | J | 01/03/2024 |
| LP-S4.55-2 | Sheet 2 | J | 01/03/2024 |
| LP-S4.55-3 | Sheet 3 | J | 01/03/2024 |
| LP-S4.55-4 | Sheet 4 | J | 01/03/2024 |
| LP-S4.55-5 | Sheet 5 | J | 01/03/2024 |

(c) Engineering Plan prepared by Woolacotts, drawing number 22-359 C101 P6C

| Drawing No. | Drawing Title | Issue | Date |
|--------------------|-------------------------------|--------------|-------------|
| C101 | Civil Works Plan Ground Floor | P6 | 16/08/2023 |

Orders:

27 The Court orders:

- (1) The appeal is upheld.
- (2) Development consent DA2021/1805 is modified in the terms in Annexure A.
- (3) Development consent DA2021/1805 as modified by the Court is Annexure B.

E Espinosa

Commissioner of the Court

238892.23 Annexure A

238892.23 Annexure B

Architecture Plans

Engineering Plans

Landscape Plans

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