



Land and Environment Court
New South Wales

Case Name: Vigor Master Pty Ltd v Northern Beaches Council

Medium Neutral Citation: [2022] NSWLEC 1558

Hearing Date(s): 20-21 July 2022

Date of Orders: 14 October 2022

Decision Date: 14 October 2022

Jurisdiction: Class 1

Before: Walsh C

Decision: The Court orders that:
1) The appeal is dismissed.
2) Development Application DA2021/0545, which seeks consent for construction of independent living units as housing for older people or people with a disability at 8 Lady Penrhyn Drive Beacon Hill (Lot 806 DP 752038), is refused.
3) The exhibits are returned with the exception of Exhibits 1, A, B and D, which are retained.

Catchwords: DEVELOPMENT APPLICATION – housing for 'older people or people with a disability – independent living units – jurisdiction – whether consistent with the desired future character described in the relevant Locality Statement – whether low intensity, low impact uses – neighbour objections

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 8.7, 8.15
Environmental Planning and Assessment Regulation 2000, cl 55
Land and Environment Court Act 1979, s 39
Standard Instrument (Local Environmental Plans) Order 2006
Warringah Local Environmental Plan 2011, cl 1.3

Warringah Local Environmental Plan 2000, cl 12, 14, 18, 29

Cases Cited: Abrams v The Council of the City of Sydney (No 2) [2018] NSWLEC 85
Lipman Properties Pty Ltd v Warringah Council [2010] NSWLEC 1310

Category: Principal judgment

Parties: Vigor Master Pty Ltd (Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
T Robertson SC (Applicant)
C Rose (Solicitor) (Respondent)

Solicitors:
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File Number(s): 2021/336738

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JUDGMENT

1 **COMMISSIONER:** These proceedings, brought under Class 1 of the Court's jurisdiction by Vigor Master Pty Ltd (applicant), are an appeal pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal by Northern Beaches Local Planning Panel of Development Application DA2021/0545 (DA). The DA seeks consent for additional accommodation in the retirement village at 8 Lady Penrhyn Drive Beacon Hill, (site). Northern Beaches Council (Council) is the respondent to the appeal by virtue of s 8.15(4) of the EPA Act.

Site and setting

2 The site has a total area of some 2.6 ha. It is of an irregular triangular shape, having frontage to both Willandra Road and Lady Penrhyn Drive. The principal vehicle access appears to be from Lady Penrhyn Drive, however there is also vehicle access directly from Willandra Drive, a higher order traffic artery.

- 3 The site contains an existing dwelling house situated at the north-west corner of the site which is addressed to Lady Penrhyn Drive. There are eight other existing detached buildings on the site. Seven of these are for the purposes of housing for older people or people with a disability under earlier approvals. These buildings are identified “A2”, “B1”, “B2”, “C1”, “C2”, “C3” and “C4” and each accommodate independent living units (ILUs) within. A further considerable building on the site comprises a private community centre. An internal access road configuration, pedestrian paths, landscaping, and stormwater management infrastructure have also been constructed on the site. There is also considerable evidence of what I might describe as unfinished bulk earthworks.
- 4 Council’s Statement of Facts and Contentions filed 18 February 2022 (Ex 1) indicates that a ninth building, identified as “A1”, similar to the other residential buildings, is also approved for the site. Building A1 is yet to be completed.
- 5 Low density housing is located west of the site, across Lady Penrhyn Drive, and to the east of Willandra Road. To the immediate north of the site is a considerable area of bushland. Bushland is also evident within a reservation encompassing Willandra Road to the east of the site and within a corridor to the south-west of the site, which runs between existing low density housing.
- 6 Figure 1 shows an aerial view of the site and surrounds.



Figure 1 - Aerial view of site and surrounds (Source Ex 1 par 9)

Proposal

- 7 In the course of the proceedings, the Court agreed under cl 55(1) of the Environmental Planning and Assessment Regulation 2000 to the applicant amending the DA. The amendments involved changes to the architectural, landscape and stormwater management plans, essentially in response to contentions raised in Ex 1 and aligned with findings in joint expert reports relating to these topics. It is understood the amendments were subsequently lodged on the NSW Planning Portal in accordance with orders made on 21 July 2022.
- 8 The proposal is seeking consent for an additional eight ILUs. The structure accommodating the new living units are termed as “Building D” in much of the documentation in the proceedings. However, as a consequence of the amendments to the proposal indicated above, the additional accommodation would in fact be located in two adjacent buildings, interspersed by landscaping. “Building D North” accommodates six units. “Building D South” accommodates two units. The form of the buildings is two levels of accommodation with parking under, partially in excavation. The new buildings would occupy vacant

land generally in the south-western area of the site, in essence, running north-south to the immediate east of a 20m wide landscape strip along Lady Penrhyn Drive. Considerable landscaping and engineering works are proposed with the application. An outline understanding of the layout, at least, can be gained from the indicative site plan at Figure 2.



Figure 2 - Indicative site plan (Source: adaption of sheet 1 of landscape plans at Annexure C to Ex 5)

Planning controls

- 9 The site falls within the areas marked as “deferred matter” under the land application map in Warringah Local Environmental Plan 2011 (WLEP2011). Clause 1.3 makes clear that such lands are not affected by WLEP2011. In turn, the provisions of Warringah Local Environmental Plan 2000 (WLEP2000) apply. It would be agreed that WLEP2000 is “an unconventional instrument”

(Respondent's Written Submissions filed 17 August 2022 (RWS) par 3).
WLEP2000 has not been influenced by the Standard Instrument (Local Environmental Plans) Order 2006. There is a need for some explanation of its content.

- 10 Clause 12 of WLEP2000 nominates matters to be considered before the grant of consent:

12 What matters are considered before consent is granted?

(1) Before granting consent for development the consent authority must be satisfied that the development is consistent with—

(a) any relevant general principles of development control in Part 4, and

(b) any relevant State environmental planning policy described in Schedule 5 (State policies).

(2) Before granting consent for development, the consent authority must be satisfied that the development will comply with—

(a) the relevant requirements made by Parts 2 and 3, and

(b) development standards for the development set out in the Locality Statement for the locality in which the development will be carried out.

(3) In addition, before granting consent for development classified as—

(a) Category One, the consent authority must consider the desired future character described in the relevant Locality Statement, or

(b) Category Two or Three, the consent authority must be satisfied that the development is consistent with the desired future character described in the relevant Locality Statement, but nothing in a description of desired future character creates a prohibition on the carrying out of development.

- 11 Clause 14 of WLEP2000 is concerned with “how the use of land will be controlled”. It provides that development of land within a “locality” is classified by the relevant Locality Statement as either Category One, Two or Three, which direct different assessment paths. Under WLEP2000 the site falls within Locality B2 Oxford Falls Valley. Category Two development includes: “housing for older people or people with disabilities (on land described in paragraph (c) under the heading “Housing density” below)”. In describing the relevant land, paragraph (c) under the housing density heading provides as follows:

(c) on land that adjoins a locality primarily used for urban purposes and on which a dwelling house is permissible, where there is no maximum housing density if the development is for the purpose of “housing for older people or

people with a disability” and the development complies with the minimum standards set out in clause 29.

- 12 The land adjoins land for urban purposes and cl 29 of WLEP2000 contains development standards on a set of grounds. If application for housing for older people or people with disabilities meets the standards for the said grounds, then the application cannot be refused on the relevant grounds. Council indicates no contention is raised in regard to any of the standards in cl 29 (RWS par 8), which I take to mean the application meets the relevant standards for each relevant nominated grounds. The nominated grounds are in relation to building height, density and scale of buildings, landscaped area, parking, and private open space.

- 13 Council also draws attention to the provisions of cl 18 (2) of WLEP2000 (RWS par 9):

“Strict compliance with development standards, however, does not guarantee that the development is consistent with either the general principles of development control or the desired future character of the locality. “

- 14 As introduced above, under the provisions of cl 12(3)(b) of WLEP2000, before granting consent, the consent authority must be satisfied that the development is consistent with the desired future character described in the relevant Locality Statement, “but nothing in a description of desired future character creates a prohibition on the carrying out of development”. Appendix B provides the following desired future character statement for Locality B2:

The present character of the Oxford Falls Valley locality will remain unchanged except in circumstances specifically addressed as follows.

Future development will be limited to new detached style housing conforming with the housing density standards set out below and low intensity, low impact uses. There will be no new development on ridgetops or in places that will disrupt the skyline when viewed from Narrabeen Lagoon and the Wakehurst Parkway.

The natural landscape including landforms and vegetation will be protected and, where possible, enhanced. Buildings will be located and grouped in areas that will minimise disturbance of vegetation and landforms whether as a result of the buildings themselves or the associated works including access roads and services. Buildings which are designed to blend with the colours and textures of the natural landscape will be strongly encouraged.

A dense bushland buffer will be retained or established along Forest Way and Wakehurst Parkway. Fencing is not to detract from the landscaped vista of the streetscape.

Development in the locality will not create siltation or pollution of Narrabeen Lagoon and its catchment and will ensure that ecological values of natural watercourses are maintained.

Issues

- 15 It is my finding that the central issue in these proceedings is whether the proposal passes the test at cl 12(3)(b) of WLEP2000. That is, whether the consent authority could be satisfied that the development is consistent with the desired future character described in the B2 Locality Statement. The issue was nominated as Contention 2 in Council's Statement of Facts and Contentions (Ex 1), but this is a jurisdictional test in any event.
- 16 While the opening paragraph of the B2 Locality Statement must be noted, the key point of interest is in the second paragraph of the B2 Locality Statement, with the relevant test in that paragraph, for this particular application, that future development is to be limited to "low intensity, low impact uses". The rest of the judgement is mostly concerned with the examination of this question.
- 17 I note that there were a considerable number of lay submissions made in regard to the proposal. These submissions were provided to me in Council's bundle of documents (Ex 2 Tabs 14-37). I also heard from a number of objectors on site, including from residents of the retirement village. A copy of notes taken from these oral submissions was tendered and marked Ex 8. The concerns raised included that which I have described as the central issue in this matter (whether development a "low intensity, low impact use"). More specific concerns were raised in regard to visual impacts, headlight impacts, inadequate landscaping, stormwater management and construction stage impacts including in relation to emergency vehicle access.
- 18 I also note that Council contentions in relation to landscape character (Contention 3) and in regard to vehicle accessway widths (Contention 5) were not subject to agreement between the experts. Council also raised concerns in regard to the construction of a proposed new pedestrian access ramp, linking the internal road to Willandra Road. The particular concern was in regard to whether the new ramp would involve vegetation removal, which had not been sufficiently investigated. The applicant believed the required environmental investigations had been completed previously. As a consequence of my

finding that there is no jurisdiction available to approve the application in any event, there is no need for attention to these further matters in this judgement.

19 A matter which arose from time to time in proceedings was the fact of a pre-existing development consent applying to the site (Development Consent DA2009/0800, which resulted from a determination of Murrell C in *Lipman Properties Pty Ltd v Warringah Council* [2010] NSWLEC 1310 (*Lipman Properties*)). These findings, and subsequent modifications to the consent for DA2009/0800, came up in merits evidence and legal submissions.

20 In its Contention 1(b) (Ex 1), Council pressed a concern on that front. I would understand Contention 1(b) to be read as follows:

1. The proposed development should be refused as it relies on unauthorised works undertaken without development consent to facilitate the proposed development.

...

(b) No detailed information has been provided by the applicant as a site audit to clearly identify those works undertaken that are not consistent with Development Consent No. DA2009/0800 and will augment, modify or change with the proposal.

...

21 Council's point was that, absent detailed information explaining the status of all works on the site, the Court cannot properly assess what is proposed (RWS par 13). In terms of the status of things on site, the applicant indicated that there remains a legal obligation to carry out the requirements of DA2009/0800 (Applicants Reply Submission filed (ARS) par 8). I accept its argument that the essential difference embodied in the application before me, apart from proposed Buildings D North and South, is that the access arrangements in DA2009/0800 would be modified. This change brings some consequential changes including to landscaping.

22 The consent for DA2009/0800 and subsequent modifications are matters that the Court can have regard to mindful of s 39(4) of the *Land and Environment Court Act 1979* (LEC Act) (*Abrams v The Council of the City of Sydney (No 2)* [2018] NSWLEC 85 at [35] – [38]). It was of assistance that the applicant provided plans of the original approval and modifications (Ex E). For context purposes, I reproduce the configuration of the approved development under

DA2009/0800, as modified, as highlighted in red in Figure 3. Here for example, I note the fact of the approval of Building A1, and a reception/office building between Buildings C1 and C2. There is also some discussion on the design merits of DA2009/0800 in the evidence.

Figure 3 – Site layout with road layout and sales building under DA2009/0800, as modified shown in red (Source Ex 7 Attachment 5 Drawing 004 dated 8/7/2022)

Evidence and consideration

23 The experts providing evidence in the proceedings were as follows:

<i>Expert</i>	<i>Expertise</i>	<i>Engaged by</i>
D Waghorn	Town planning	Applicant
A Keller	Town planning	Council

R Dickson	Urban design, architecture, landscape architecture	Applicant
A Susko	Urban design	Council
T Steal	Traffic, parking	Applicant
J Brocklebank	Traffic, parking	Council
P Scrivener	Landscape architecture	Applicant
A Powe	Landscape architecture	Council

24 As indicated above, there was some difference between the experts as to the impacts of the proposal on the local landscape character and setting. Changes incorporated into amending plans, including additional landscaping near the existing site entrance, draw me to the conclusion that while the new building works would visually intrude somewhat when passing by the site along Lady Penrhyn Drive, the impact is not great. When considering the jurisdictional question at cl 12(3)(b) of LEP2000, I am more interested in the more immediate impacts.

25 I note that the experts agreed to adopt the definition for “impact” cited in *Lipman Properties*, as follows:

Impact - is commonly used in planning assessment to identify the likely future consequences of proposed development in terms of its surroundings and can relate to visual, noise, traffic, vegetation, streetscape privacy, solar access etc. Therefore ‘ low impact’ would constitute a magnitude of impacts such that was minimal, minor or negligible level and unlikely to significantly change the amenity of the locality.

26 Mr Waghorn believes the impacts associated with the proposal would be “negligible to minor, at worst.” His evidence suggested the fact that the proposal complied with relevant development standards was relevant to his position. His view was that the proposed buildings would be “nestled” into the site and would be visually compatible, including when consideration was given

to proposed landscaping. The proposal was “unlikely to tip the balance and change the amenity of the locality” (Ex 7 pars 1.36-1.37).

- 27 It is the evidence of Mr Keller that (Ex 7 par 1.102):

The construction of ‘building D’ closes in building C2 (to be surrounded on all sides by buildings) and takes away the southern outlook to building A1 and B1 and the western outlook to building C1.

- 28 Oral expert evidence was also sought on some of the concerns raised in objector submissions. I need to give consideration to such matters mindful of s 4.15(1)(d) of the EPA Act, but the issues raised also had some pertinence to the evaluation of matters related to cl 12(3)(b) of WLEP2000, in particular in relation to intensity and impact. A point of particular attention was the relationship between proposed vehicle access to the new units including basement parking and the existing properties to the immediate east. The driveway to parking in the new buildings would be located between the new buildings and existing Buildings C1 and C2, with parking access perpendicular to the line of the driveway. The plans show this driveway to also be used by Building B1 and proposed Building A1 (Ex 7 Figure 1 p 12). A point raised in objections was headlight spill into bedrooms in Buildings C1 and C2.

- 29 Mr Keller thought the proposed “gunbarrel” access arrangement, and headlight spill potential, would provide a poor amenity outcome for existing residents. When questioned on whether there was really likely to be so much of concern with headlights in this setting, Mr Keller indicated that there could visitors or family members attending at any time. I understood Mr Waghorn to believe that given the use of premises by seniors, headlight spill may be less of a concern. He also argued what was proposed was an improvement over the existing approval (Ex 7 par 1.47):

...the deletion of the approved meandering road and other structures to be replaced by Building D and revised landscaped buffer within the front setback area is a better outcome which will allow for an enhanced landscaped treatment on the site.

- 30 In regard to the reference to “other structures” above, I believe Mr Waghorn would have included the reception/office building approved via modification application.

- 31 Mr Keller thought the opposite in regard to comparisons with the current approvals, arguing that there had been meticulous attention to amenity considerations with the approval of DA, with the result including the S-Shaped driveway and detailed landscaping.

Consideration

- 32 Having had the opportunity to view the site and the context of the proposal, and evaluate the evidence, it is clear to me that the proposal breaches the established limitation under the B2 Locality Statement that future development be limited to “low intensity, low impact uses”. It follows that I am not satisfied that the proposed development is consistent with the desired future character described in the B2 Locality Statement, and in turn, under cl 12(3)(b) of WLEP2000, there is no jurisdiction to grant consent in this instance.
- 33 In the consideration of the evidence, I essentially agree with the arguments submitted by Mr Keller over Mr Waghorn. It is clear that the proposal, including the proposed access configuration, would bring a considerable adverse impact on the local setting, and those residences which are adjacent to it. The massing of the new buildings would take away from the southern outlook to approved Building A1 and existing B1 and also detract from the western outlooks from Buildings C1 and C2. It is a significant adverse effect in this particular setting that Building C2 would be surrounded by buildings. While there may be better outlooks in other directions from these buildings, that does not mean the affectation on these outlooks would not impact significantly. For comparative purposes I would note that the approved smaller reception/office between Buildings C1 and C2 would not compare in impact with the current proposal.
- 34 The arrangements for the parking for the new buildings, in particular in regard to egress from under building parking, seemed a poor design outcome and was unsatisfactory in regard to potential impacts from headlight spill. I was not convinced by the argument that occupants of these premises (over 55s and persons with disability) would so seldom drive at night, when compared to the wider population, for headlight spill to be not a concern.

- 35 On Mr Waghorn's argument that the proposal was an improvement over the current approval (DA2009/0800 as modified), I was more persuaded by Mr Keller's evidence. This for me was that the approved design, including curvilinear road arrangement, provided an integrated response to amenity opportunities and concerns. In relation to headlight spill concerns, I accept Mr Keller's advice that this involved landscaping. The current approval has also been purposeful in the provision of individual landscape outlooks for the ILUs.
- 36 I do note that, in submissions, the applicant draws attention to certain points of terminology used in the second paragraph to the desired future character statement for Locality B2 in WLEP2000. The first sentence to the second paragraph initially refers to "future development" being limited to certain forms of housing and then, more relevant for my determination here, as I would interpret it, future development being limited to "low intensity, low impact *uses*" (my emphasis on "uses"). The applicant points to "a clear distinction in the sentence between buildings and uses" (AWS par 24). While I note the point, my key concern here is that the proposed use (ie independent living units) would bring about certain impacts, that are beyond the notion of low impact. The applicant submits that "there could not be a lower intensity use than seniors living" and when consideration is given to the findings of the Court in *Lipman* (that the then the development form qualified as a low intensity, low impact use) "it is difficult to see what "impacts" differentiate the current application from the original development" (AWS par 29). I have indicated what I believe to be the different impacts (consequent upon the current proposal when compared to the existing approvals) above. Generally, I agree with Mr Keller that there are key distinctions between the proposal before me and the pre-existing approved development.
- 37 While the proposal before me readily meets the density standard, the new massing of development to the south and west of approved development would impact upon outlooks and provide other than the sense of openness that seems to me to have been a factor in the approved schema. There are also the direct effects of headlight glare from access from use of the new ILUs upon the amenity enjoyed within existing ILUs.

Conclusion

38 I am not satisfied that the proposed development is consistent with the desired future character described in the B2 Locality Statement, and in turn, under cl 12(3)(b) of WLEP2000, there is no jurisdiction to grant consent.

39 The Court orders that:

- (1) The appeal is dismissed.
- (2) Development Application DA2021/0545, which seeks consent for construction of independent living units as housing for older people or people with a disability at 8 Lady Penrhyn Drive Beacon Hill (Lot 806 DP 752038), is refused.
- (3) The exhibits are returned with the exception of Exhibits 1, A, B and D, which are retained.

.....

P Walsh

Commissioner of the Court

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