



Land and Environment Court
New South Wales

Case Name: BL2093 Pty Ltd v Northern Beaches Council (No. 2)

Medium Neutral Citation: [2022] NSWLEC 1065

Hearing Date(s): 4 and 5 August 2021

Date of Orders: 8 February 2022

Decision Date: 8 February 2022

Jurisdiction: Class 1

Before: Chilcott C

Decision: Orders: see [14].

Catchwords: DEVELOPMENT APPLICATION – boarding house development – development on a narrow lot – development on an isolated lot – whether proposed development is compatible with the character of the local area – whether proposed side setbacks are acceptable – whether proposed breach of side boundary envelope control is acceptable – application of cl 4.15(3A) of the EP&A Act – reasonable alternative solutions.

Legislation Cited: Environmental Planning and Assessment Regulation 2000, cl 3

Cases Cited: BL2093 Pty Ltd v Northern Beaches Council [2021] NSWLEC 1784

Texts Cited: Australian Building Codes Board, National Construction Code, 2019

Category: Principal judgment

Parties: BL2093 Pty Ltd (Applicant)
Northern Beaches Council (Respondent)

Representation:

Counsel:

M Seymour (Applicant)

S Patterson (Solicitor) (Respondent)

Solicitors:

Mills Oakley (Applicant)

Wilshire Webb Staunton Beattie (Respondent)

File Number(s):

2021/43433

Publication Restriction:

No

JUDGMENT

- 1 **COMMISSIONER:** In a judgment given on 22 December 2021, *BL2093 Pty Ltd v Northern Beaches Council* [2021] NSWLEC 1784 (the initial judgment), I handed down my decision on the appeal by BL2093 Pty Ltd against the refusal by the Northern beaches Council of its development application no. DA2020/1597.
- 2 That application sought consent for the demolition of existing structures and construction of a part three (3), part four (4) storey boarding house with 26 boarding rooms over two levels of basement car parking for 13 cars with landscaping at 67 Pacific Parade, Dee Why.
- 3 At paragraph [103] of the initial judgment the Parties were directed as follows:
 - (1) to confirm, by Friday 28 January 2022, the validity of the Applicant's BASIX certificate prior to the Court making final orders in this appeal or, if necessary, to file an updated BASIX certificate for the Proposed Development by that date;
 - (2) to file with the Court final agreed conditions of consent, reflecting the conclusions of the judgment at [101], by no later than 3pm on Friday 28 January 2022.
- 4 The Parties have now complied with those directions and have:
 - (1) confirmed that, following the conclusion of the hearing on 5 August 2021 at which time I reserved judgment in this matter:
 - (a) on 26 November 2021, cl 3 of the Environmental Planning and Assessment Regulation 2000 was amended to exclude boarding houses from the definition of a 'BASIX affected building', provided it can accommodate more than 12 residents and has a gross floor area of more than 300m²;

- (b) the Applicant's development application no. DA2020/1597 proposes a boarding house that accommodates up to 52 residents and has a total gross floor area of 979.4m²;
 - (c) as a consequence of the above ((a)) and ((b)) a further updated BASIX Certificate is no longer required and the boarding house will be assessed at a later stage against the Section J requirements of the National Construction Code;
- (2) provided final conditions of consent reflecting the conclusions in the Court's judgment, and agreed save for the imposition of a Condition 19(b), in relation to which:
- (a) the Respondent is of the view that the judgment does not specify whether this condition should be imposed; whereas
 - (b) the Applicant is of the view that having regard to paragraphs [41] and [71]-[74], that condition 19(b) is not to be imposed; and
 - (c) the parties invited me to clarify whether condition 19(b) should be imposed.

5 Within the initial judgment, I stated:

- (1) at paragraph [41], that having considered the evidence of the experts and the submissions of the Parties, I was satisfied that the Proposed Development is compatible with the character of the local area, and I provided reasons for this; and

- (2) at paragraphs [71] to [74] as follows:

"[71] Notwithstanding this opinion from Ms Young, and noting that the Applicant's proposed side setback was fixed within the Proposed Development, the Respondent proposed the imposition of a draft condition of consent (draft condition 19), which it said would resolve concerns in relation to potential visual privacy impacts arising from the proximity of the Proposed Development to the adjoining development at 65 Pacific Parade, as follows:

"19. Amendments to the approved plans

The following amendments are to be made to the approved plans:

- (a) Fixed angled vertical louvre screens directed towards winter sun/north west corner of the site shall be installed to windows to units L101 to L103 and L204 to L206.

Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of the construction certificate.

Reason: To ensure development minimises unreasonable impacts upon surrounding land."

[72] During the hearing, the Respondent proposed that in addition to the units identified in its draft condition 19, fixed angled louvres should also be required for unit 303 located at the rear upper south west corner of the Proposed Development, to address visual privacy concerns in relation to a rear upper balcony on the adjoining site.

[73] Having considered the evidence of the Parties' expert planners and urban designers, I have concluded that there remain unresolved potential visual privacy impacts between the Proposed Development and the adjoining RFB at 65 Pacific Parade. In particular, I am concerned that:

potential visual privacy impacts may arise in relation to the location of the certain balconies on the building on the lot adjacent and

(2) the burden of management of potential impacts arising from the Proposed Development may be placed upon the residents of the adjoining building rather than being resolved within the Proposed Development.

[74] As a consequence, I agree with the submission of the Respondent that its proposed condition 19 (see above at [71]) should be imposed with any grant of consent approving the Proposed Development, and agree with the Respondent that the condition should also require the installation of fixed angled louvre screens to the west facing windows of proposed unit 303."

- 6 As noted at paragraph [71] of the initial judgment, I had arrived at my conclusion at paragraph [74] relying on the draft of condition 19 as submitted by the Respondent in the proceedings and which was provided to the Court on 5 August 2022.
- 7 Further, in reaching the conclusion at paragraph [74] I said that "I agree with the submission of the Respondent that its proposed condition 19 (see above at [71]) should be imposed with any grant of consent approving the Proposed Development".
- 8 However, in arriving at the conclusion in paragraph [74] of the initial judgment, I had omitted to consider a further submission by the Respondent, provided within a version of conditions received from the Applicant on 1 September 2021. That later version of proposed conditions was responsive to a direction made at the conclusion of the hearing inviting the Parties to provide their alternate proposed draft conditions, with submissions, for my consideration.

- 9 The version of conditions received from the Applicant on 1 September 2021, had included a condition 19(b), proposed by the Respondent, in the following terms:

“(b) The window configurations to the north and south elevations shall be amended to reflect the 'top, middle and base' composition of building elements as illustrated in the two preliminary sketches prepared by Benson McCormack Architect reference the Joint Expert Town Planning and Urban Design report dated 3 August 2021.”

- 10 The Respondent had submitted that the reason for proposing the imposition of draft condition 19(b) was to ensure that the window configuration of the north and southern elevation provides variation to reflect the streetscape as had been agreed by the Parties' town planning and urban design experts within their joint report as referred to in the condition.
- 11 I have now had the opportunity to review that submission and the evidence of the town planning and urban design experts, both in the joint report and at the hearing, and I have concluded that the version of proposed condition 19, including condition 19(b), that is reflective of the agreed evidence of the experts should be imposed for the reasons provided by those experts, which I adopt.
- 12 Consequently, the final version of Condition 19 to be imposed with the grant of consent to the Applicant's development application will be:

19. “The following amendments are to be made to the approved plans:

(a) Fixed angled vertical louvre screens directed towards winter sun/northwest corner of site shall be installed to windows to units L101 to L103 and L204 to L206.

(b) The window configurations to the north and south elevations shall be amended to reflect the 'top, middle and base' composition of building elements as illustrated in the two preliminary sketches prepared by Benson McCormack Architect reference the Joint Expert Town Planning and Urban Design report dated 3 August 2021.

Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of the construction certificate.

Reason: To ensure development minimises unreasonable impacts upon surrounding land and visual impacts to the streetscape.”

- 13 As the Parties' conditions of consent have now been filed, and the one point of disagreement between the Parties concerning those conditions is resolved, the Court is able to make final orders.

Orders

- 14 The Court orders:

- (1) The appeal is upheld;
- (2) Development Application DA2020/1597 for the demolition of existing structures and construction of a part three (3), part four (4) storey boarding house with 26 boarding rooms over two levels of basement car parking for 13 cars with landscaping at 67 Pacific Parade, Dee Why, is determined by the grant of consent, subject to the conditions at Annexure 'A' to this judgment;
- (3) The exhibits are returned, with the exception of Exhibits A, B, C, D and 1.

.....

M Chilcott

Commissioner of the Court

Annexure A (415137, 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.