



## Land and Environment Court New South Wales

<b>Medium Neutral Citation:</b>	<b>BPG Holdings (No. 5) Pty Limited v Northern Beaches Council [2021] NSWLEC 1357</b>
<b>Hearing dates:</b>	Conciliation conference on 25 May, 31 May and 8 June 2021
<b>Date of orders:</b>	18 June 2021
<b>Decision date:</b>	18 June 2021
<b>Jurisdiction:</b>	Class 1
<b>Before:</b>	Bradbury AC
<b>Decision:</b>	<p>The Court orders that:</p> <p>(1) The Applicant is granted leave to amend development application DA2020/1172 to rely upon the plans referred to in condition 1 of Annexure A.</p> <p>(1A) The applicant is to pay the respondent's costs thrown away as a result of the amendment of the development application pursuant to s 8.15(3) of the <i>Environmental Planning and Assessment Act 1979</i>, in the amount of \$3,000.</p> <p>(2) The appeal is upheld.</p> <p>(3) Development consent is granted to development application DA2020/1172 for the demolition of existing structures and construction of a seniors housing development to accommodate 6 units including associated car parking and landscape works on Lot 42 Section 2 DP 4689 known as 54 Bardo Road Newport subject to the conditions of consent set out in Annexure A.</p>
<b>Catchwords:</b>	APPEAL – development application – seniors housing – conciliation conference – agreement reached – orders made
<b>Legislation Cited:</b>	Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7, 8.10 Environmental Planning and Assessment Regulation 2000, cl 49, 55 Land and Environment Court Act 1979, s 34

State Environmental Planning Policy No 55— Remediation of Land

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, cl 15, 16, 26, 27, 28, 30, 31, 32, 40, 41

State Environmental Planning Policy (Infrastructure) 2007, cl 45

Pittwater Local Environmental Plan 2014, cl 4.3, 7.1, 7.2, 7.6, 7.10

**Texts Cited:**

Seniors Living Policy: Urban Design Guideline for Infill Development - Department of Infrastructure, Planning and Natural Resources (March 2004)

**Category:**

Principal judgment

**Parties:**

BPG Holdings (No. 5) Pty Ltd ACN 57284295198  
(Applicant)

Northern Beaches Council (Respondent)

**Representation:**

Counsel:

G McKee (Solicitor) (Applicant)

A Gough (Solicitor) (Respondent)

Solicitors:

McKees Legal Solutions (Applicant)

Storey & Gough Lawyers (Respondent)

**File Number(s):**

2020/349112

**Publication restriction:**

Nil

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## JUDGMENT

- 1 **COMMISSIONER:** This appeal concerns a development application (DA) for seniors housing in Newport. The site comprises Lot 42 Section 2 DP 4689 and is known as 54 Bardo Road Newport (the Land).
- 2 The appeal is lodged pursuant to s 8.7 of the Environmental Planning and Assessment Act 1979 (EPA Act) and is an appeal in Class 1 of the Court's jurisdiction.
- 3 In exercising the functions of the consent authority on the appeal, the Court has the power to determine the DA pursuant to s 4.16 of the EPA Act.
- 4 The Court arranged a conciliation conference between the parties, pursuant to s 34(1) of the Land and Environment Court Act 1979 (LEC Act). The conciliation conference commenced on 25 May 2021 and concluded on 25 May 2021. I presided over the conciliation conference.

At the conciliation conference, an agreement under s 34(3) of the LEC Act was reached between the parties as to the terms of a decision in the proceedings that would be acceptable to the parties. The signed agreement was subsequently filed on 15 June 2021 and is supported by a Joint Jurisdictional Note, also provided by the parties on 15 June 2021. The agreement involves the Court exercising the function under cl 55 of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation) to grant leave to the applicant to amend the DA and for development consent to be granted subject to conditions of consent pursuant to s 4.16(1) of the EPA Act.

6 The amendments enable the retention of additional mature trees on the site by the making of a number of changes to the design including:

- (1) Adjusting the driveway ramp slope into the basement to avoid the tree protection zone (TPZ) of tree 7;
- (2) Amending the walkway accessing the units to suspended timber decking;
- (3) The removal of trees 11, 14 and 15 to provide greater deep soil area for the roots of trees 12 and 13 enabling reduced competition for soil moisture and nutrients and enhancing the longevity of trees 12 and 13.

7 I am satisfied that the proposed amendment to the DA is within the scope of the amendment power in cl 55 of the EPA Regulation. The essence of the development the subject of the DA remains the same.

8 Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision if it is a decision that the Court could have made in the proper exercise of its functions.

9 I am satisfied that the parties' decision is one that the Court could have made in the proper exercise of its functions. I have formed this state of satisfaction for the following reasons:

- (1) The applicant is the owner of the Land and is able to make the DA in accordance with cl 49 of the EPA Regulation.
- (2) The appeal was brought pursuant to s 8.7 and was made within the time required by s 8.10 of the EPA Act.
- (3) The proposed development is for the purpose of seniors housing. The Land is within zone R2 Low Density Residential under the Pittwater Local Environmental Plan 2014 (the LEP). While development for the purpose of seniors housing is prohibited on land within that zone, development for the purpose of a dwelling house is permitted on the Land. The State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors SEPP) therefore applies to the Land. Under cll 15 and 16 of the Seniors SEPP, development for the purposes of seniors housing is permitted with development consent on land on which development for the purpose of a dwelling house is permitted. The proposed development is therefore permissible with development on the Land.

- (4) In determining the DA, I have had regard to the objectives of the R2 Low Density Residential zone in the LEP. An objective of that zone is to provide for the housing needs of the community within a low density residential environment and the proposed development is consistent with that objective.
- (5) The proposed development complies with the applicable development standard in the LEP relating to building height (cl 4.3). The height of the proposed development is 7.5 metres which is less than the applicable maximum building height of 8.5 metres.
- (6) Clause 7.1 of the LEP requires development consent for the carrying out of works on land which is shown on the Acid Sulfate Soils Map. With respect to the proposed development, the Land is mapped as Class 5 land. Clause 7.2 requires development consent for the carrying out of works on Class 5 land only if such works are within 500m of adjacent class 1, 2, 3 or 4 land that is below 5m Australian Height Datum (AHD) and by which the water table is likely to be lowered below 1m AHD on adjacent class 1, 2, 3 or 4 land. The subject land is not within 500m of adjacent class 1, 2, 3 or 4 land.
- (7) The proposed development requires consent under cl 7.2 of the LEP as it involves the excavation of the site to create a basement parking level. In deciding to grant consent to the proposed development I have considered the matters listed in cl 7.2(3). The DA includes details of the proposed stormwater management and is accompanied by a geotechnical report.
- (8) The land is identified as "Biodiversity" on the Biodiversity Map in the LEP and I have considered the matters listed in cl 7.6(3) of the LEP. For the purposes of cl 7.6(4) of the LEP, I am satisfied that, as amended, the development is designed, sited and will be managed to minimise any significant adverse environmental impact. The DA is accompanied by a Biodiversity Management Plan (BMP) and an Arboriculture Report. The BMP considers the matters within cl 7.6 and concludes that the proposal complies with the clause as the development is predominantly situated on areas of urban exotic and native vegetation and minimises clearing.
- (9) I am also satisfied that the essential services listed in cl 7.10 of the LEP are available to the Land.
- (10) For the purposes of cl 26 of the Seniors SEPP, I have had regard to the Statement of Environmental Effects prepared by Mr Greg Boston dated September 2020 (the SEE) and the Traffic Management Report prepared by Nermein Loka of Loka Consulting Engineers dated 3 September 2020 and am satisfied that residents of the proposed development will have access, that complies with cl 26(2) of the Seniors SEPP, to:
  - (a) shops, bank service providers and other retail and commercial services that residents may reasonably require, and

- (b) community services and recreation facilities, and
  - (c) the practice of a general medical practitioner.
- (11) The Land is not identified as bushfire prone land and cl 27 of the Seniors SEPP therefore does not apply.
- (12) Pursuant to cl 28 of the Seniors SEPP, a consent authority must not consent to a development application for seniors housing made under the Seniors SEPP unless it is satisfied, by written evidence, that the housing will be connected to a reticulated water system and have adequate facilities for the removal or disposal of sewage. The SEE indicates that the Land currently contains a dwelling house that is connected to a reticulated water and sewerage system and that the proposed development will connect to those systems. Having regard to that evidence I am satisfied that the proposed development will be connected to a reticulated water system and have adequate facilities for the removal or disposal of sewage.
- (13) Clause 30 of the Seniors SEPP provides that a consent authority must not consent to a development application made under that Policy unless it is satisfied that the applicant has taken into account a site analysis prepared by the applicant in accordance with this clause. A site analysis plan and the SEE which accompanied the DA satisfactorily address the requirements of this clause.
- (14) Clause 31 of the Seniors SEPP provides that in determining a development application to carry out development for the purpose of in-fill self-care housing, a consent authority must take into consideration (in addition to any other matters that are required to be, or may be, taken into consideration) the provisions of the *Seniors Living Policy: Urban Design Guideline for Infill Development* published by the Department of Infrastructure, Planning and Natural Resources in March 2004. These provisions are addressed in the SEE and I have taken them into consideration in the determination of the DA.
- (15) Clause 32 of the Seniors SEPP provides that a consent authority must not consent to a development application for seniors housing unless the consent authority is satisfied that the proposed development demonstrates that adequate regard has been given to the principles set out in Chapter 3 Part 3 Division 2 of the Seniors SEPP. The SEE addresses each of these principles and I am satisfied that the proposed development demonstrates that adequate regard has been given to them.
- (16) Under cl 40(2) of the Seniors SEPP, the size of the site must be at least 1,000 m<sup>2</sup>. The Land has an area of 1226.3 m<sup>2</sup> which exceeds the specified minimum lot size.
- (17)

Under cl 40(3) of the Seniors SEPP, the site frontage must be at least 20 metres wide measured at the building line. The site frontage of the Land is 20.1115 m which is greater than the specified minimum.

- (18) Residential flat buildings are not permitted in the R2 Zone under the LEP and cl 40(4) of the Seniors SEPP therefore applies to the proposed development. I am satisfied that the proposed development is less than the maximum height limit of 8 m and does not exceed 2 storeys.
- (19) In accordance with cl 41 of the Seniors SEPP, I am satisfied that the proposed development complies with the development standards set out in Schedule 3 of the Seniors SEPP.
- (20) State Environmental Planning Policy No 55—Remediation of Land applies to the Land. The Land has been used for residential purpose for many years and there is no indication that any contaminant generating uses have been carried out on it. The continued use of the Land for residential purposes will not change and I am satisfied that the Land is suitable for the proposed ongoing residential use.
- (21) In accordance with cl 45 of the State Environmental Planning Policy (Infrastructure) 2007 the development application was referred to Ausgrid which provided a response indicating that the proposed development is acceptable subject to compliance with the relevant Ausgrid Network Standards and SafeWork NSW Codes of Practice. These recommendations are reflected in the proposed conditions of consent.
- (22) In accordance with the provisions of the State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004, a BASIX Certificate No 1130450M\_02 dated 17 March 2021 issued by Loka Consulting Engineers was submitted with the DA. I am satisfied that, in combination with the conditions of consent, the requirements of this Policy have been met.
- (23) The original DA was notified in accordance with Council's Notifications Policy between 27 October 2020 and 13 November 2020. The Council received 14 submissions raising concerns about the impact on biodiversity, impact on trees and lack of landscaping, location and accessibility, amenity impacts (especially on traffic and car parking), overdevelopment and inappropriate character. The amended application was notified between 17 May 2021 and 24 May 2021 and 3 submissions were received raising further concerns about these issues. I am satisfied that these issues have been addressed by the amended design and conditions of consent.

10 As the parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required by s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.

The parties have not raised, and I am not aware of, any jurisdictional impediment to the making of these orders to give effect to the agreement between the parties. Further, in making the orders, I was not required to make, and have not made, any assessment of the merits of the DA against the discretionary matters that arise pursuant to an assessment under s 4.15 of the EPA Act.

12 The Court orders that:

(1) The Applicant is granted leave to amend development application DA2020/1172 to rely upon the plans referred to in condition 1 of Annexure A.

(1A) The applicant is to pay the respondent's costs thrown away as a result of the amendment of the development application pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, in the amount of \$3,000.

(2) The appeal is upheld.

(3) Development consent is granted to development application DA2020/1172 for the demolition of existing structures and construction of a seniors housing development to accommodate 6 units including associated car parking and landscape works on Lot 42 Section 2 DP 4689 known as 54 Bardo Road Newport subject to the conditions of consent set out in Annexure A.

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**A Bradbury**

**Acting Commissioner of the Court**

[Annexure A \(345638,.pdf\)](#)

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## **Amendments**

29 June 2021 - 29 June 2021 - Pursuant to r 36.17 of the Uniform Civil Procedure Rules 2005 (the slip rule), the order made on 18 June 2021 is amended to incorporate the following additional order:

“(1A) The applicant is to pay the respondent's costs thrown away as a result of the amendment of the development application pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, in the amount of \$3,000.”

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Decision last updated: 29 June 2021