



Land and Environment Court
New South Wales

Case Name: O'Hanlon v Northern Beaches Council

Medium Neutral Citation: [2021] NSWLEC 1578

Hearing Date(s): Conciliation conference on 18 June, 8 and 20 July and 19 August 2021, final agreement filed 28 September 2021

Date of Orders: 30 September 2021

Decision Date: 30 September 2021

Jurisdiction: Class 1

Before: Pullinger AC

Decision: The Court orders that:
(1) 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 sum of \$10,000 within 28 days.
(2) The appeal is upheld.
(3) Consent is granted to Development Application DA2019/1447, as amended, for the demolition of existing structures, the Torrens title subdivision of 1 lot into 2 lots and construction of a dwelling house, swimming pool and ancillary structures on each lot, at 27 Alan Avenue, Seaforth, subject to the conditions contained at Annexure A.

Catchwords: DEVELOPMENT APPLICATION – subdivision – dwelling houses – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7, 8.15
Environmental Planning and Assessment Regulation 2000, cl 55

Land and Environment Court Act 1979, s 34
Manly Local Environmental Plan 2013, cll 2.6, 2.7, 4.1,
4.3, 4.4, 6.1, 6.2, 6.4, 6.8, 6.12
State Environmental Planning Policy (Building
Sustainability Index: BASIX) 2004
State Environmental Planning Policy No 55—
Remediation of Land, cl 7

Texts Cited: Land and Environment Court of New South Wales,
COVID-19 Pandemic Arrangements Policy (April
2021)
Manly Development Control Plan 2013

Category: Principal judgment

Parties: Darren Sean O’Hanlon (Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
A Boskovitz (Solicitor) (Applicant)
A Gough (Solicitor) (Respondent)

Solicitors:
Boskovitz Lawyers (Applicant)
Storey and Gough Lawyers (Respondent)

File Number(s): 2021/55713

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of Development Application DA2019/1447 (DA) by Northern Beaches Council (the Respondent). The DA sought consent for demolition work, Torrens title subdivision of 1 lot into 2 lots and construction of a dwelling house, swimming pool and fencing on each lot, at 27 Alan Avenue, Seaforth (the site).
- 2 The Court arranged a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 18 June, 8 and 20 July and 19 August 2021. I presided over the conciliation conference.

- 3 Consistent with the Court's *COVID-19 Pandemic Arrangements Policy*, published on 6 April 2021, the matter commenced with a site view, limited in the number of participants, and thereafter was conducted by Microsoft Teams.
- 4 Prior to the conciliation conference, the Applicant prepared a set of plans, on a without prejudice basis, incorporating changes intended to resolve the contentions raised by the Respondent. These amended plans formed the subject of the conciliation conference.
- 5 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. The agreement involves the Court upholding the appeal and granting development consent to a further, final amended proposal, subject to conditions.
- 6 Whilst the final amended proposal remains substantially the same as the original DA, a series of design changes cumulatively resolve the contentions raised by the Respondent, which in turn relate primarily to streetscape character, building height, floor space and density, built form and scale amongst other contentions.
- 7 In summary, the agreed amendments have the effect of reducing the scale and form of the two dwellings, improving their presentation to the streetscape and reducing impacts upon immediate neighbours.
- 8 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' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application.
- 9 There are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 10 In that regard, I am satisfied the DA was made with the consent (in writing) of the registered proprietors of the site, being the Applicant in these proceedings.
- 11 The parties agree, and I am satisfied, the Manly Local Environmental Plan 2013 (MLEP) is a relevant environmental planning instrument. The site is zoned R2 Low Density Residential development for the purposes of creating a

two lot Torrens title subdivision and the construction of dwelling houses on each lot is permissible with consent within the R2 zone.

- 12 The parties agree, and I am satisfied, that the final amended proposal is consistent with the objectives of the R2 zone in that it provides for the housing needs of the community within a low density residential environment.
- 13 The parties agree, and I am satisfied, that the proposed demolition is permissible with consent pursuant to cl 2.7 of the MLEP.
- 14 The parties agree, and I am satisfied, that the proposed subdivision is permissible with consent pursuant to cl 2.6 of the MLEP, and each resultant lot complies with the minimum lot size (600sqm) required by cl 4.1 of the MLEP.
- 15 The parties agree, and I am satisfied, that the final amended proposal complies with the 8.5m height of building development standard set out in cl 4.3 of the MLEP.
- 16 The parties agree, and I am satisfied, that each of the two dwellings within the final amended proposal complies with the 0.45:1 floor space ratio development standard set out in cl 4.4 of the MLEP.
- 17 The parties agree, and I am satisfied, that the site is located on land identified as a Class 5 area pursuant to cl 6.1 - Acid sulfate soils - of the MLEP. I am also satisfied the proposal does not involve work at 5 metres AHD or lower. The parties note that groundwater and acid sulfate soils were addressed in the Applicant's geotechnical investigation prepared by White Geotechnical Group dated 26 September 2019.
- 18 The parties agree, and I am satisfied, that matters arising in cl 6.2 - Earthworks - of the MLEP have been considered as part of the assessment of the final amended proposal. These matters are also addressed in the Applicant's geotechnical investigation prepared by White Geotechnical Group dated 26 September 2019. I am satisfied the proposed earthworks and excavation will not have a detrimental impact on the soil stability or the amenity of the neighbouring uses. The final amended proposal has minimised the amount of excavation on the eastern and southern boundaries. Conditions of consent further ensure the protection of neighbouring properties.

- 19 The parties agree, and I am satisfied, that matters arising in cl 6.4 - Stormwater management - of the MLEP have been considered in the assessment of the final amended proposal. I am satisfied stormwater plans have been prepared to relate to the final amended proposal which satisfy the Respondent of the provision of on-site detention, the provision of adequate permeable areas to allow for on-site collection of stormwater, adequate sediment control and the provision of rainwater collection.
- 20 The parties agree, and I am satisfied, that matters arising in cl 6.8 - Landslide risk - of the MLEP have been considered as part of the assessment of the final amended proposal. I am satisfied the final amended proposal has been designed to avoid potential land slip and risks associated with land slip.
- 21 The parties agree, and I am satisfied, that matters arising in cl 6.12 - Essential services - of the MLEP have been considered as part of the assessment of the final amended proposal. I am satisfied the necessary essential services are available to the site.
- 22 I am satisfied State Environmental Planning Policy 55 – Remediation of Land (SEPP 55) is an additional relevant environmental planning instrument. The parties agree the site and its immediate vicinity have historically been used for residential purposes. The site is currently occupied by a single dwelling house. The final amended proposal does not seek to alter the categorisation of land use. As such, I am satisfied cl 7(1) of SEPP 55 has been appropriately addressed.
- 23 The parties agree, and I am satisfied, that two BASIX certificates, corresponding with each of the two proposed dwellings, have been submitted in support of the final amended proposal, fulfilling the necessary requirements of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004. Conditions of consent have been imposed to ensure compliance with the BASIX certificates.
- 24 Finally, in accordance with s 4.15(1) of the EPA Act, the parties agree, and I am satisfied, the final amended proposal may be granted consent, and in considering and responding to submissions from objectors, the final amended proposal is in the public interest.

25 Having considered each of the preceding jurisdictional requirements, and having formed the necessary view required by s 34(3) of the LEC Act, I find it is appropriate to make the orders agreed to by the parties and now dispose of the matter.

Orders

26 The Court notes that:

- (1) Northern Beaches Council, as the relevant consent authority, has agreed under cl 55(1) of the Environmental Planning and Assessment Regulation 2000, to the Applicant amending Development Application DA2019/1447 by incorporating a series of design changes that reduce bulk and scale and improve the presentation to the streetscape.
- (2) The Applicant has effected lodgement of the amended Development Application on the NSW Planning Portal on 20 August 2021.
- (3) The Applicant has subsequently filed with the Court a copy of the amended Development Application on 28 September 2021.

27 The Court orders that:

- (1) 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 sum of \$10,000 within 28 days.
- (2) The appeal is upheld.
- (3) Consent is granted to Development Application DA2019/1447, as amended, for the demolition of existing structures, the Torrens title subdivision of 1 lot into 2 lots and construction of a dwelling house, swimming pool and ancillary structures on each lot, at 27 Alan Avenue, Seaforth, subject to the conditions contained at Annexure A.

.....

M Pullinger

Acting Commissioner of the Court

Annexure A (276664, pdf)

Amendments

29 October 2021 - Pursuant to UCPR r 36.17 and with the consent of all parties, amend Annexure A to the judgment of 30 September 2021 by

amending various revision numbers and dates of Architectural Plans,
Engineering Plans, Reports and Landscape Plans listed at Condition 1.

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.