



Land and Environment Court

New South Wales

Case Name: Laxland 3 Pty Ltd as the Trustee for Laxland 3 Trust v Northern Beaches Council

Medium Neutral Citation: [2024] NSWLEC 1350

Hearing Date(s): Conciliation Conference on 9 May 2024

Date of Orders: 25 June 2024

Decision Date: 25 June 2024

Jurisdiction: Class 1

Before: Targett AC

Decision: The Court orders that:
(1) The appeal is upheld.
(2) The applicant is to pay the respondent's costs thrown away as a result of the amendment of development application DA 2023/0995 in the amount of \$1,000 pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979.
(3) Development Application No. DA 2023/0995 lodged on 27 July 2023, as amended, for demolition of existing dwellings and the construction of a seniors housing development, incorporating eight in-fill self-care housing units and basement car-parking at 52-54 Brighton Street, Freshwater NSW 2096 (also known as Lot 38 in DP 14450 and Lot A in DP 384323) is determined by the granting of consent, subject to the conditions set out in Annexure A.

Catchwords: APPEAL – Development application – seniors housing – conciliation conference – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 8.7, 8.10, 8.15
Land and Environment Court Act 1979, ss 17, 34

Environmental Planning and Assessment Regulation
2021, s 38
State Environmental Planning Policy Amendment
(Housing) 2023
State Environmental Planning Policy (Building
Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Housing) 2021, Pt
5, Div 6 ss 79, 84, 85, 88, 81, 93, 95, 97, 98, 108, Sch 4
ss 5, 7, 16, Sch 7A s 8
State Environmental Planning Policy No 65 – Design
Quality of Residential Apartment Development, cl 28,
Sch 1
State Environmental Planning Policy (Resilience and
Hazards) 2021, cl 4.6
State Environmental Planning Policy (Sustainable
Buildings) 2022, s 4.2
Warringah Local Environmental Plan 2011 cll 4.3, 4.4,
4.6, 5.21, 6.2 6.4

Texts Cited:

Department of Infrastructure, Planning and Natural
Resources, Seniors Living Policy: Urban Design
Guideline for Infill Development, March 2004
Department of Planning and Environment, Apartment
Design Guide, July 2015
Northern Beaches Community Participation Plan 2019
Standards Australia, AS2890.6:2022, November 2022
Warringah Development Control Plan 2011

Category:

Principal judgment

Parties:

Laxland 3 Pty Ltd as the Trustee for Laxland 3 Trust
(Applicant)
Northern Beaches Council (Respondent)

Representation:

Counsel:
P Murray (Solicitor) (Applicant)
J Simpson (Solicitor) (Respondent)

Solicitors:
Addisons Lawyers
Northern Beaches Council (Respondent)

File Number(s):

2023/284138

Publication Restriction: No

JUDGMENT

Background

- 1 **COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) by the applicant against the respondent's deemed refusal of the applicant's development application (DA2023/0995) (Development Application) seeking consent for the demolition of existing dwellings and construction of a seniors housing development, incorporating eight in-fill self-care housing units and basement car-parking, on land identified as Lot 38 in Deposited Plan 14450 and Lot A in Deposited Plan 384323, known as 52-54 Brighton Street, Freshwater (Subject Land).
- 2 The Court has power to dispose of these proceedings under its Class 1 jurisdiction pursuant to s 17(d) of the *Land and Environment Court Act 1979* (LEC Act).

The Development Application

- 3 The Development Application was lodged with the respondent on 27 July 2023.
- 4 Due to the number of submissions received (discussed further at [17] below), the Development Application was referred to the Northern Beaches Council Development Determination Panel (Panel) for determination.
- 5 On 7 September 2023, the proceedings were commenced against the deemed refusal of the Development Application, being within the appeal period prescribed by s 8.10 of the EPA Act.
- 6 On 3 October 2023, the respondent filed its Statement of Facts and Contentions.
- 7 On 17 October 2023, the applicant filed its Statement of Facts and Contentions in Reply.
- 8 The Court arranged a conciliation conference under s 34 of the LEC Act between the parties, which was held on 31 October 2023. The conciliation was

subsequently terminated. The matter was listed for hearing on 9 to 13 May 2024.

- 9 On 14 December 2023, the applicant was granted leave by the Court to rely on amended plans. The amended plans relevantly included:
 - (1) reducing gross floor area;
 - (2) increasing ground floor side setbacks;
 - (3) reducing first floor side setbacks;
 - (4) re-aligning front setbacks and floor plates;
 - (5) reducing the basement footprint and total excavation volume;
 - (6) revising internal configurations and external finishes; and
 - (7) revising various landscaping elements,(December Amendments).
- 10 On 6 February 2024, the respondent filed its Amended Statement of Facts and Contentions (ASOFAC) which removed some, but not all of the contentions.
- 11 On 22 February 2024, the applicant filed its Amended Statement of Facts and Contentions in Reply.
- 12 Prior to the hearing, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. The decision agreed upon is for the grant of consent to the Development Application, in a further amended form (Amended Development Application), subject to conditions of consent.
- 13 The parties provided a signed s 34 agreement on 6 May 2024 supported by an agreed jurisdictional statement.
- 14 The parties requested that the matter be listed for a further conciliation conference.
- 15 The matter was then listed for a conciliation conference on 9 May 2024. I presided over this conciliation conference and the hearing was vacated.
- 16 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.

Submissions and notification

- 17 The Development Application was notified between 2 and 16 August 2023. 165 written submissions were received in response to the notification of the proposal (with approximately 90 in objection). The written submissions were filed with the Court on 17 October 2023.
- 18 The December Amendments were re-exhibited in accordance with the Northern Beaches Community Participation Plan between 19 December 2023 and 25 January 2024. Fourteen submissions in objection to the proposal were received from residents who had previously objected to the Development Application. These submissions were provided to the Court on 8 May 2024. The concerns raised generally included issues of:
- (1) floor space ratio;
 - (2) bulk and scale;
 - (3) streetscape and character;
 - (4) traffic and parking impacts;
 - (5) flooding and stormwater;
 - (6) tree removal and landscaping;
 - (7) solar access; and
 - (8) privacy impacts and views/outlook.
- 19 On 10 April 2024, further without prejudice amended architectural and landscaping plans were provided to residents who had objected to the Development Application. Thirteen written objections were received in relation to the without prejudice amended plans (provided to the Court on 8 May 2024). The objections primarily centred around flooding and stormwater, as well as issues of privacy, bulk and scale, traffic and parking.
- 20 Four objectors addressed the Court at the on-site view associated with the conciliation conference on 9 May 2024. The Court also inspected 56 Brighton Street, Freshwater, at the request of the resident.

Jurisdictional considerations

- 21 As the presiding Commissioner, I am satisfied that the decision is one that the Court can make in the proper exercise of its functions (this being the test

applied by s 34(3) of the LEC Act). I form this state of satisfaction for the reasons that follow.

Owner's consent

- 22 The Development Application was lodged by the applicant with the consent of the owner of the Subject Land (see Class 1 Application, tab 2).

State Environmental Planning Policy (Resilience and Hazards) 2021

- 23 I accept the parties' submission that the requirements of State Environmental Planning Policy (Resilience and Hazards) 2021 have been considered and the Subject Land is suitable to accommodate the development the subject of the Amended Development Application. This is primarily because of the Subject Land's longstanding history of residential use with no known history of potentially contaminating uses or events and the results of the Geotechnical Investigation Report prepared by Crozier Geotechnical Consultants dated July 2023 (Geotech Report) which did not identify any indication of contamination.

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

- 24 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX) continues to apply to the Amended Development Application, as it was submitted but not finally determined before 1 October 2023 (see s 4.2(1)(a) of State Environmental Planning Policy (Sustainable Buildings) 2022).
- 25 The Amended Development Application is accompanied by a BASIX certificate (Cert No 1407484M_03, dated 11 March 2024) prepared by Building Sustainability Assessments in accordance with SEPP BASIX and the Environmental Planning and Assessment Regulation 2021 (EPA Regulation).

State Environmental Planning Policy (Housing) 2021

- 26 The Subject Land is zoned R2 Low Density Residential under the Warringah Local Environmental Plan 2011 (WLEP). The Amended Development Application, being a seniors housing proposal, is prohibited in the R2 zone under the WLEP. The Amended Development Application therefore relies on the provisions of State Environmental Planning Policy (Housing) 2021 (Housing SEPP), and in particular, ss 8, 79 and 81, such that seniors housing

development is permissible with consent in a R2 low density residential zone, and to the extent of inconsistency between the Housing SEPP and another environmental planning instrument (for example, the WLEP), the Housing SEPP prevails to the extent of the inconsistency.

27 For completeness, it was not disputed that the State Environmental Planning Policy Amendment (Housing) 2023 (Amending Policy) which was passed on 14 December 2023, did not apply to the Amended Development Application. This is because of the savings and transitional provisions contained within s 8 of Sch 7A of the Amending Policy which relevantly provide that “an amendment made to this policy by the amending policy does not apply to the following – (a) a development application made, but not determined, on or before 14 December 2023”.

28 It was not disputed that the Development Application was:

(1) “made” on 27 July 2023 when it was lodged with the respondent – being a date before 14 December 2023; and

(2) “not determined” on or before 14 December 2023.

29 Therefore, the Housing SEPP as at 13 December 2023 is the correct version of the Housing SEPP which must be considered in the determination of the Amended Development Application and all further references to the Housing SEPP will reflect this version.

30 Section 84(2) of the Housing SEPP sets out development standards for seniors housing as follows:

(2) Development consent must not be granted for development to which this section applies unless—

(a) the site area of the development is at least 1,000m², and

(b) the frontage of the site area of the development is at least 20m measured at the building line, and

(c) for development on land in a residential zone where residential flat buildings are not permitted—

(i) the development will not result in a building with a height of more than 9.5m, excluding servicing equipment on the roof of the building, and

(ii) if the roof of the building contains servicing equipment resulting in the building having a height of more than 9.5m— the servicing equipment complies with subsection (3), and

(iii) if the development results in a building with more than 2 storeys—the additional storeys are set back within planes that project at an angle of 45 degrees inwards from all side and rear boundaries of the site.

- 31 The parties agree that the Amended Development Application complies with all of the standards listed in s 84(2) with the exception of s 84(2)(c)(iii). The Amended Development Application proposes minor breaches of the third storey building plane development standard (Height Plane Standard) as a result of the raised ground level required to address the flood affectation of the Subject Land. To address this non-compliance, the Amended Development Application is supported by a cl 4.6 variation request prepared by Boston Blyth Fleming Town Planners dated 12 April 2024 (Height Plane Request).
- 32 The Height Plane Request provides a detailed assessment of the Amended Development Application's compliance with the matters raised in cl 4.6 of the WLEP and concludes that:
- (1) Compliance with the Height Plane Standard relating to three storey development in s 84(2)(c)(iii) of the Housing SEPP is unreasonable or unnecessary in the circumstances of this case because the development achieves the inferred objectives of the standard (being to minimise the visual impact of the portions of development that exceeds two storeys in height, to ensure compatibility with the scale of surrounding development, and to minimise impacts upon the amenity of adjoining properties) and the R2 zone notwithstanding the breach.
 - (2) The proposed development will promote the orderly and economic development of the Subject Land by appropriately responding to the topography and flood affectation of the Subject Land and by being well within the building envelope prescribed by the Warringah Development Control Plan 2011 (WDCP). The parties agree that these environmental planning grounds justify the contravention of the Height Plane Standard.
 - (3) The proposed development will be in the public interest because it is consistent with the inferred objectives of the Height Plane Standard and the objectives for development within the R2 zone under the WLEP.
 - (4) The contravention of the Height Plane Standard does not raise any matter of significance for State or regional environmental planning and there is no public benefit in maintaining the Height Plane Standard in this case.
- 33 As set out in the Joint Report of Town Planning experts prepared by Mr Greg Boston and Mr Adam Croft filed 16 April 2024 (Joint Town Planning Report), the town planners agree that compliance with the standard is unreasonable and unnecessary in the circumstances, and there are sufficient environmental

planning grounds to justify the contravention (at [26]-[34]). The town planners also agree that the proposal will be in the public interest because it is consistent with the inferred objectives of the Height Plane Standard and the R2 zone objectives.

- 34 The parties submit and I accept that the Height Plane Request adequately addresses the matters that are required to be demonstrated under cl 4.6(3) of the WLEP and that the development proposed in the Amended Development Application will be in the public interest because it is consistent with the inferred objectives of the Height Plane Standard and the objectives for development in the R2 zone set out in the Land Use Table in the WLEP, for the reasons given in the Height Plane Request.
- 35 I have also considered whether the contravention of the Height Plane Standard raises any matter of significance for State or regional environmental planning, and the public benefit of maintaining the development standard, pursuant to cl 4.6(5) of the WLEP. I find no grounds on which the Court should not uphold the Height Plane Request.
- 36 For completeness, I note that the Amended Development Application complies with the height standard prescribed by s 84(2)(c)(i) of 9.5m (proposing a height of 8.6m). This is notwithstanding cl 4.3 of the WLEP which prescribes a height limit of 8.5m for the Subject Land, on the basis that the Housing SEPP prevails to the extent of any inconsistency with the WLEP (discussed further at [63] below).
- 37 Section 85(1) of the Housing SEPP relevantly provides that development consent must not be granted for development for the purposes of an independent living unit unless the independent living unit complies with the standards specified in Sch 4 of the Housing SEPP.
- 38 The parties agree that the Access Design Compliance Statement prepared by Pymont Access Consulting dated 7 December 2023 which formed part of the Amended Development Application (Access Report) confirms that the Amended Development Application complies with the standards specified in Sch 4 with the exception of items:

- (1) Section 5(a) Private car accommodation: “car parking spaces must comply with the requirements for parking for persons with a disability set out in AS 2890.6” (Private Car Standard);
- (2) Section 7(3) Interior: general: “circulation space at approaches to internal doorways must comply with AS 1428.1” (Interior Standard); and
- (3) Section 16(d) Kitchen: “A kitchen in an independent living unit must have – (d) “D” pull cupboard handles that are located towards the top of below-bench cupboards and towards the bottom of overhead cupboards” (Kitchen Standard).

39 To address these non-compliances, the Amended Development Application is supported by three further cl 4.6 variation requests prepared by Boston Blyth Fleming Town Planners dated 12 April 2024 (being the Private Car Request, Interior Request and Kitchen Request, respectively and “Sch 4 Requests” collectively).

40 The Private Car Request provides a detailed assessment of the Amended Development Application’s compliance with the matters raised in cl 4.6 and concludes that:

- (1) Compliance with the Private Car Standard is unreasonable or unnecessary in the circumstances of this case because the development achieves the inferred objectives of the standard (being to ensure that appropriate private car parking is provided for persons with a disability including the ability to utilise a shared area between 2 car parking spaces for accessibility) and the R2 zone notwithstanding the breach.
- (2) Each apartment in the proposed development is provided with a private garage containing two car parking spaces compliant with the dimensional requirements of AS2890.6. The AS2890.6 requirement to provide a shared area with a bollard and access path is therefore unnecessary and unreasonable in the circumstances. The parties agree that this environmental planning ground justifies the contravention of the Private Car Standard.
- (3) The proposed development will be in the public interest because it is consistent with the inferred objectives of the Private Car Standard and the objectives for development within the R2 zone under the WLEP.
- (4) The contravention of the Private Car Standard does not raise any matter of significance for State or regional environmental planning and there is no public benefit in maintaining the Private Car Standard in this case.

41 The Interior Request provides a detailed assessment of the Amended Development Application’s compliance with the matters raised in cl 4.6 and concludes that:

- (1) Compliance with the Interior Standard is unreasonable or unnecessary in the circumstances of this case because the development achieves the inferred objectives of the standard (being to ensure appropriate access and circulation within an independent living unit for persons with a disability) and the R2 zone notwithstanding the breach.
- (2) The proposed development achieves compliant access to all kitchens, main bedrooms and bathrooms and it is unreasonable and unnecessary to require the same compliance regarding access to secondary and tertiary bedrooms, particularly where all apartments are single level. The parties agree that these environmental planning grounds justify the contravention of the Interior Standard.
- (3) The proposed development will be in the public interest because it is consistent with the inferred objectives of the Interior Standard and the objectives for development within the R2 zone under the WLEP.
- (4) The contravention of the Interior Standard does not raise any matter of significance for State or regional environmental planning and there is no public benefit in maintaining the Interior Standard in this case.

42 The Kitchen Request provides a detailed assessment of the Amended Development Application's compliance with the matters raised in cl 4.6 and concludes that:

- (1) Compliance with the Kitchen Standard is unreasonable or unnecessary in the circumstances of this case because the development achieves the inferred objectives of the standard (being to ensure that seniors or persons with a disability are able to operate below bench and overhead cupboards) and the R2 zone notwithstanding the breach.
- (2) The proposed development is consistent with the amended kitchen standards in the most recent version of the Housing SEPP. Notwithstanding this, the kitchen cupboards proposed by the Amended Development Application will still either have "D" pull cupboard handles or push catch mechanisms which are more suitable for people with hand impairments, noting that the "D" pull handles can still be installed at any time at low cost after completion of the building. The parties agree that these environmental planning grounds justify the contravention of the Kitchen Standard.
- (3) The proposed development will be in the public interest because it is consistent with the inferred objectives of the Kitchen Standard and the objectives for development within the R2 zone under the WLEP.
- (4) The contravention of the Kitchen Standard does not raise any matter of significance for State or regional environmental planning and there is no public benefit in maintaining the Kitchen Standard in this case.

43 As set out in the Joint Town Planning Report, the town planners agree that compliance with the Private Car Standard, Interior Standard and Kitchen Standard is unreasonable and unnecessary in the circumstances, and there

are sufficient environmental planning grounds to justify the contraventions (at (8)-(9)). The town planners also agreed that the proposal will be in the public interest because it is consistent with the inferred objectives of the Private Car Standard, Interior Standard and Kitchen Standard and the R2 zone objectives.

- 44 The parties submit and I accept that the Sch 4 Requests adequately address the matters that are required to be demonstrated under cl 4.6(3) of the WLEP and that the development proposed in the Amended Development Application will be in the public interest because it is consistent with the inferred objectives of the Private Car Standard, Interior Standard and Kitchen Standard and the objectives for development in the R2 zone under the WLEP, for the reasons given in the Sch 4 Requests.
- 45 I have also considered whether the contravention of the Private Car Standard, Interior Standard and Kitchen Standard raise any matter of significance for State or regional environmental planning, and the public benefit of maintaining the development standards, pursuant to cl 4.6(5) of the WLEP. I find no grounds on which the Court should not uphold the Sch 4 Requests.
- 46 Section 88(2) of the Housing SEPP relevantly provides that development consent must not be granted unless the consent authority is satisfied that only seniors (or the kinds of people listed in s 88(1)) will occupy accommodation to which the development relates. Having regard to Condition 94 of the agreed conditions, I am satisfied that only the category of people listed in s 88(1) of the Housing SEPP will occupy the proposed development.
- 47 Pursuant to s 93 of the Housing SEPP, development consent must not be granted for development for the purposes of an independent living unit unless the consent authority has considered whether residents will have adequate access to facilities and services as defined in s 93(5). The parties submit and I am satisfied that the residents of the proposed development will have adequate access to facilities and services for the reasons given in the Access Report.
- 48 Pursuant to s 95 of the Housing SEPP, a consent authority must not consent to development unless the consent authority is satisfied the seniors housing will be connected to reticulated water system and have adequate facilities for the

removal or disposal of sewage. The parties submit and I accept that the proposed development will connect to these existing systems.

- 49 Section 97 of the Housing SEPP requires a consent authority to consider the Seniors Living Policy: Urban Design Guideline for Infill Development, March 2004 (Seniors Living Guideline) in determining a development application for the purposes of in-fill self-care housing. In determining the Amended Development Application, the parties submit and I am satisfied that the Seniors Living Guideline has been considered having regard to the Statement of Environmental Effects prepared by Boston Blyth Fleming Town Planners dated July 2023 (SEE) (at pp18-21).
- 50 Section 98 of the Housing SEPP provides that a consent authority must not consent to development for the purposes of seniors housing unless the consent authority is satisfied that the design of the seniors housing demonstrates adequate consideration has been given to the principles set out in Div 6 of Pt 5 of the Housing SEPP.
- 51 The SEE (at pp 21-24) directly addresses each of the principles prescribed by Div 6 of Pt 5 of the Housing SEPP. The parties' stormwater experts agree that the Amended Development Application minimises the disturbance and impacts of stormwater runoff and the proposal includes water tanks for water re-use (see the Joint Stormwater report prepared by Mr Mikhail, Mr Stuart and Mr Makomaski filed 2 April 2024 (Joint Stormwater Report). Further, the town planning experts agree (see Joint Town Planning Report at (28)-(29)) that the Amended Development Application:
- (1) Will generally be perceived as a two-storey building despite portions of the basement being technically described as a storey.
 - (2) Presents front, side and rear setbacks that result in an acceptable level of visual bulk when viewed from surrounding properties and the public domain and will be mitigated by the articulation of the façade and generous landscaped areas.
 - (3) Avoids adverse privacy impacts to adjoining properties.
 - (4) Provides adequate daylight to residents without adversely impacting neighbouring properties.
- 52 Having regard to the SEE, Joint Town Planning Report, Joint Stormwater Report and the agreed conditions of consent, I am satisfied that the principles

in Div 6 of Pt 5 of the Housing SEPP have been adequately considered in the design of the proposed seniors housing development the subject of the Amended Development Application.

- 53 Section 108 of the Housing SEPP identifies development standards for particular matters relating to development for the purposes of independent living units that, if complied with, prevent the consent authority from requiring more onerous standards for those matters. The parties agree that the Amended Development Application complies with all of the non-discretionary matters listed in s 108(2) of the Housing SEPP with the exception of s 108(2)(c) which provides that “the density and scale of the buildings when expressed as a floor space ratio is 0.5:1 or less” (FSR Standard).
- 54 The parties agree that the floor space ratio (FSR) proposed by the Amended Development Application is 0.55:1, thereby exceeding the FSR Standard for the Subject Land.
- 55 Whilst the parties agree that a cl 4.6 request is not strictly required as there is no FSR control for the Subject Land under the WLEP, a cl 4.6 request has been prepared by Boston Blyth Fleming Town Planners dated 12 April 2024 (FSR Request) in support of the Amended Development Application to address the non-compliance with the discretionary standard in s 108(2)(c) of the Housing SEPP.
- 56 The FSR Request provides a detailed assessment of the Amended Development Application’s compliance with the matters raised in cl 4.6 of the WLEP and concludes that:
- (1) Compliance with the FSR Standard is unreasonable or unnecessary in the circumstances of this case because the development achieves the objectives of the standard (utilising the objectives in cl 4.4(1) of the WLEP) and the R2 zone notwithstanding the breach.
 - (2) The proposed development achieves design and floor space distribution efficiencies through allotment size and geometry, which will better achieve the objectives of the Housing SEPP to enable and encourage the development of housing for seniors, and is consistent with objectives (c) and (g) in s 1.3 of the EPA Act in that it will promote the orderly and economic development of the Subject Land increasing the supply and diversity of residents that meet the needs of seniors or persons with a disability, and is of exceptional design quality. The

parties agree that there are sufficient environmental planning grounds to justify the contravention of the FSR Standard.

- (3) The proposed development will be in the public interest because it is consistent with the objectives of the FSR Standard (as taken from cl 4.4 of the WLEP) and the objectives for development within the R2 zone under the WLEP.
- (4) The contravention of the FSR Standard does not raise any matter of significance for State or regional environmental planning and there is no public benefit in maintaining the FSR Standard in this case.

57 As set out in the Joint Town Planning Report, the town planners agree that compliance with the FSR Standard is unreasonable and unnecessary in the circumstances, and there are sufficient environmental planning grounds to justify the contravention (at (14)-(21)). The town planners also agree that the proposal will be in the public interest because it is consistent with the objectives of the FSR Standard and the R2 zone objectives.

58 The parties submit and I accept that the FSR Request adequately addresses the matters that are required to be demonstrated under cl 4.6(3) of the WLEP and that the development proposed in the Amended Development Application will be in the public interest because it is consistent with the objectives of the FSR Standard and the objectives for development in the R2 zone set out in the Land Use Table in the WLEP, for the reasons given in the FSR Request.

59 I have also considered whether the contravention of the Height Plane Standard raises any matter of significance for State or regional environmental planning, and the public benefit of maintaining the development standard, pursuant to cl 4.6(5) of the WLEP. I find no grounds on which the Court should not uphold the Height Plane Request.

State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65)

60 Clause 28(2) of State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65) nominates matters that must be considered before the Amended Development Application is determined. The Amended Development Application was accompanied by a Design Verification Statement which addressed compliance with the Apartment Design Guide and design quality principles under Sch 1 of SEPP 65. Further, the Development Application was referred to the respondent's Design and

Sustainability Advisory Panel which provided its recommendations. These recommendations were taken into consideration by the parties in conjunction with the Apartment Design Guide and design quality principles. The parties submit and I accept that the Amended Development Application satisfies the design quality principles and meets the objectives of the Apartment Design Guide.

Warringah Local Environmental Plan 2011

- 61 The Subject Land is zoned R2 Low Density Residential under the WLEP. Development for the purposes of seniors housing is prohibited within the R2 zone, however, as set out above at [26], the use is made permissible due to the operation of the Housing SEPP.
- 62 I have had regard to the R2 zone objectives which are extracted below:
- To provide for the housing needs of the community within a low density residential environment.
 - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
 - To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.
- 63 Pursuant to cl 4.3 of the WLEP, the maximum height of buildings on the Subject Land is limited to 8.5m. However, s 108(2)(a) of the Housing SEPP provides a “non-discretionary development standard” of 9.5m for the purposes of independent living units. As the Housing SEPP prevails over the WLEP to the extent of any inconsistency, the proposed building height of 8.6m complies with the non-discretionary standard and the Amended Development Application cannot be refused on this basis.
- 64 The Subject Land is not mapped as having a maximum FSR under the WLEP. However, s 108(2)(c) of the Housing SEPP provides a “non-discretionary development standard” for FSR of 0.5:1 or less. As set out above at [54], the proposed development provides a FSR of 0.55:1 which is 10% greater than the non-discretionary development standard and a cl 4.6 variation request has been prepared on this basis.

65 Clause 5.21(2) and (3) of the WLEP relevantly provides that development consent must not be granted to development on land within a flood planning area unless the consent authority is satisfied of, and has considered, specified matters. Flooding was a key issue raised by objectors in respect of the Development Application and Amended Development Application.

66 The parties agree that the Subject Land is identified as flood prone on Council's mapping and cl 5.21 therefore applies to the Amended Development Application.

67 Clause 5.21 of the WLEP relevantly provides that:

...

(2) Development consent must not be granted to development on land the consent authority considers to be within the flood planning area unless the consent authority is satisfied the development—

(a) is compatible with the flood function and behaviour on the land, and

(b) will not adversely affect flood behaviour in a way that results in detrimental increases in the potential flood affectation of other development or properties, and

(c) will not adversely affect the safe occupation and efficient evacuation of people or exceed the capacity of existing evacuation routes for the surrounding area in the event of a flood, and

(d) incorporates appropriate measures to manage risk to life in the event of a flood, and

(e) will not adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses.

(3) In deciding whether to grant development consent on land to which this clause applies, the consent authority must consider the following matters—

(a) the impact of the development on projected changes to flood behaviour as a result of climate change,

(b) the intended design and scale of buildings resulting from the development,

(c) whether the development incorporates measures to minimise the risk to life and ensure the safe evacuation of people in the event of a flood,

(d) the potential to modify, relocate or remove buildings resulting from development if the surrounding area is impacted by flooding or coastal erosion.

...

68 The term “adverse impacts” is defined in the A.8 Interpretation section of the WDCP as follows:

“Adverse Impacts

(for the purposes of the Flood Prone Land clause only) means, the proposed development:

- Will result in less than 0.02m increase in the 1% AEP
- Will result in less than a 0.05m increase in the PMF
- Will result less than a 10% increase in PMF peak velocity
- Will have no loss in flood storage or flood way in the 1% AEP”

69 The parties agree that the Amended Development Application:

- (1) Is compatible with the flood function and behaviour on the land because the proposed development will not adversely affect flood behaviour in a way that results in detrimental increases in the potential flood affection of private development and properties. The flood modelling contained in the Hydraulic Impact Assessment & Flood Management Addendum prepared by RTS dated 27 March 2024 (Updated Flood Assessment) (forming part of the Amended Development Application) demonstrates that the proposed development will result in:
 - (a) less than a 0.02m increase in the 1% AEP (or 1 in 100 year flood) within adjacent residential/private properties;
 - (b) less than a 0.05m increase in the Probable Maximum Flood (PMF) in adjacent residential/private properties; and
 - (c) less than a 10% increase in PMF peak velocity by virtue of the flood modelling demonstrating that the 0.02m and 0.05m threshold increases for “adverse impacts” will not be exceeded at adjacent private properties.
- (2) Will result in exceedances beyond 0.02 and 0.05m respectively in the Council verge. Although the definition of “adverse impacts” does not distinguish between public and private land, the parties agree that the definition in the WDCP provides useful but conservative guidance and the parties are satisfied based on the merits of the Amended Development Application for there to be exceedances on public land provided that there are no exceedances beyond those specified in the definition of “adverse impacts” on private land.
- (3) Is in the public interest as it will provide increased stormwater pipeline capacity, reducing the risk of blockages and provide better flood immunity for the community (Joint Stormwater Report, p 4).
- (4) Will not adversely affect the safe occupation and efficient evacuation of people and incorporates appropriate measures to manage risk to life in the event of a flood (Overland Flow Study & Impact Assessment Report prepared by RTS dated 20 July 2023 (Flood Assessment) (see (6.1)-(6.2)).

- 70 In addition, I note that the Overland Flow Study & Impact Assessment Report prepared by RTS dated 20 July 2023 (Flood Assessment) also relevantly provides that:
- (1) “The front storage replaced by the front components of the development is considered negligible” (at (4.4)); and
 - (2) “The development is not envisaged to adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of riverbanks or watercourses” (at (4.6)).
- 71 Having regard to the agreed position of the parties, conclusions of the Joint Stormwater Report, Flood Assessment, Updated Flood Assessment, and agreed conditions of consent relating to flooding and stormwater management, I am satisfied of the matters specified in cl 5.21(2) and have considered the matters listed in cl 5.21(3) of the WLEP.
- 72 The Amended Development Application seeks consent for excavation and earthworks. Clause 6.2(3) of the WLEP prescribes a number of mandatory matters that must be considered prior to the granting of development consent. In determining the Amended Development Application, I have considered the matters set out in cl 6.2(3) of the WLEP, including the assessment and findings set out in the Geotech Report and the agreed conditions of consent with respect to the proposed earthworks.
- 73 The Subject Land is identified on the Landslip Risk Map under the WLEP. Clause 6.4(3) of the WLEP is therefore relevant to the Amended Development Application and prescribes a number of matters which the consent authority must be satisfied of prior to the granting of development consent. In determining the Amended Development Application, I have considered the findings and recommendations of the Geotech Report and agreed opinion of the flooding and water experts as set out in the Joint Stormwater Report, and am satisfied of the matters set out in cl 6.4(3) of the WLEP.

Remaining matters under s 4.15(1)(b)-(e) of the EPA Act

- 74 The parties agree that the Amended Development Application can be approved taking into consideration the matters listed in s 4.15(1) of the EPA Act. Matters relevant to subss (a), (b), (c) and (e) have been generally considered above and in the SEE.

75 In relation to s 4.15(1)(d), as noted at [17] – [20] above, there was significant community opposition to the Development Application and Amended Development Application. The parties agree that the Amended Development Application addresses the resident objections and concerns regarding:

- (1) stormwater and flood modelling;
- (2) built form, design, amenity, landscaping;
- (3) traffic, parking and pedestrian safety;
- (4) demolition, excavation, construction impacts and geotechnical information,
- (5) acoustic assessment,

and agree that the proposal is in the public interest, acceptable in terms of its impact on the natural and built environments and social and economic impacts in the locality, and the Subject Land is suitable for the proposed development.

76 I am satisfied that the written and oral submissions received have been taken into consideration in the assessment and determination of the Amended Development Application.

77 In determining the Amended Development Application, I have taken into consideration such of the matters that are of relevance to the proposal listed in s 4.15(1) of the EPA Act.

Conclusion

78 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.

79 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.

80 The Court notes that:

- (1) The respondent, as the relevant consent authority has, pursuant to section 38 of the Environmental Planning and Assessment Regulation 2021, consented to the following amendments to development application No DA 2023/0995:

1.	Architectural plans prepared by Walsh Architects, Revision G:
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Sheet No.	Description	Date
DA030	Demolition Plan	27 March 2024
DA040	Proposed Site Plan	27 March 2024
DA100	Services Level Plan	27 March 2024
DA101	Basement Plan	27 March 2024
DA102	Ground Floor Plan	27 March 2024
DA103	Level 1 Plan	27 March 2024
DA104	Roof Plan	27 March 2024
DA200	Long Sections	27 March 2024
DA201	Cross Sections	27 March 2024
DA300	Elevations – Sheet 1	27 March 2024
DA301	Elevations – Sheet 2	27 March 2024

	DA901	External Finishes	27 March 2024	
2.	Landscape plans prepared by Plot Design Group, Revision E:			
	Sheet No.	Description	Date	
	LS501.1	Landscape Plan (Ground) – Sheet 1	27 March 2024	
	LS501.2	Landscape Plan (Ground) – Sheet 2	27 March 2024	
	LS501.3	Landscape Plan (Level 1) – Sheet 3	27 March 2024	
	LS503.1	Landscape Details – Sheet 5	27 March 2024	
	LS503.2	Landscape Details (Planting) – Sheet 6	27 March 2024	
3.	Stormwater plans prepared by RTS Civil Consulting Engineers, Revision E:			
	Sheet No.	Description	Date	
	SW001	Coverpage, Notes & Calculations	7 March 2024	
	SE100	Sediment & Erosion Control Plan (Rev D)	7 March	

			2024
	SE200	Sediment & Erosion Control Plan Details (Rev D)	7 March 2024
	SW100	Site Stormwater Catchment Plan, Easement & Flood Barrier Plan (Rev F)	2 May 2024
	SW101	Basement Stormwater Management Plan	7 March 2024
	SW102	Ground Stormwater Management Plan	7 March 2024
	SW200	Stormwater Drainage Plan Details Sheet 1 of 3	7 March 2024
	SW201	Stormwater Drainage Plan Details Sheet 2 of 3	7 March 2024
	SW202	Stormwater Drainage Plan Details Sheet 3 of 3	7 March 2024
	SW300	Stormwater Easement Pipeline Longitudinal Section	7 March 2024
	SW301	Stormwater Easement Pipeline	7

	Pit Details	March 2024
4.	Hydraulic Impact Assessment Report & Flood Management Addendum prepared by RTS Civil Consulting Engineers (Revision A03) dated 6 May 2024	
5.	Access Design Compliance Statement – Seniors Housing prepared by Pymont Access Consulting (Revision 1.5) dated 7 March 2024	
6.	Arboricultural Impact Assessment prepared by Hugh the Arborist (Revision A) dated 8 March 2024	
7.	BASIX Certificate No 1407484M_03 prepared by Building Sustainability Assessments (Revision 3) dated 11 March 2024	
8.	Traffic Impact Assessment prepared by Genisis Traffic (Revision 7) dated 8 March 2024	
9.	Clause 4.6 Request (FSR) prepared by BBF Town Planners dated 12 April 2024	
10.	Clause 4.6 Request (Building Planes) prepared by BBF Town Planners dated 12 April 2024	
11.	Clause 4.6 Request (Schedule 4, Clause 5(a)) prepared by BBF Town Planners dated 12 April 2024	
12.	Clause 4.6 Request (Schedule 4, Clause 7(3)) prepared by BBF Town Planners dated 12 April 2024	
13.	Clause 4.6 Request (Schedule 4, Clause 16(d)) prepared by BBF Town Planners dated 12 April 2024	

Orders

81 The Court orders that:

- (1) The appeal is upheld.
- (2) The applicant is to pay the respondent's costs thrown away as a result of the amendment of development application DA 2023/0995 in the amount of \$1,000 pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*.
- (3) Development Application No DA 2023/0995 lodged on 27 July 2023, as amended, for demolition of existing dwellings and the construction of a seniors housing development, incorporating eight in-fill self-care housing units and basement car-parking at 52-54 Brighton Street, Freshwater NSW 2096 (also known as Lot 38 in DP 14450 and Lot A in DP 384323) is determined by the granting of consent, subject to the conditions set out in Annexure A.

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Acting Commissioner of the Court

Annexure A

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