



Land and Environment Court
New South Wales

Case Name: Allen Group Developments Pty Ltd v Northern Beaches Council

Medium Neutral Citation: [2023] NSWLEC 1541

Hearing Date(s): Conciliation conference on 23 June 2023 and 25 August 2023

Date of Orders: 20 September 2023

Decision Date: 20 September 2023

Jurisdiction: Class 1

Before: Dickson C

Decision: The Court orders that:

- (1) Pursuant to section 8.15(3) of the Environmental Planning and Assessment Act 1979 the Applicant is to pay the costs of the Respondent that are thrown away as a result of the Applicant filing the Amended Application, in the agreed amount of \$10,000.00 within 28 days of these orders.
- (2) The request pursuant to clause 4.6 of the Manly Local Environmental Plan 2013 to vary the development standard for height contained within clause 4.3 thereof, as prepared by BBF Town Planners dated 28 August 2023, is upheld.
- (3) The request pursuant to clause 4.6 of the Manly Local Environmental Plan 2013 to vary the development standard for floor space ratio contained within clause 4.4 thereof, as prepared by BBF Town Planners dated 28 August 2023, is upheld.
- (4) The appeal is upheld.
- (5) Development consent is granted to Development Application No. DA2022/0688, which seeks consent for the demolition of existing structures and construction of a residential flat building and associated works at 33

and 35 Fairlight Street, Fairlight (Lot 8 & 9, Sec B DP 3742), subject to the conditions of consent in Annexure A.

Catchwords: DEVELOPMENT APPLICATION – demolition and construction of a residential flat building – amended plans and documents – agreement between the parties – orders made

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 8.7, 8.15
Environmental Planning and Assessment Regulation 2021, ss 23, 37, Sch 7
Land and Environment Court Act 1979, s 34
Manly Local Environmental Plan 2013, cl 4.3, 4.6, 4.4, 5.10, 6.2, 6.4, 6.9, 6.12
State Environmental Planning Policy (Biodiversity and Conservation) 2021, s 6.65, Ch 10, s 10.10
State Environment Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development, cl 4
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6

Cases Cited: Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118
Neutral Bay Pty Ltd v North Sydney Council [2019] NSWCA 130

Texts Cited: Department of Planning and Environment, Apartment Design Guide, July 2015
Department of Planning, Industry and Environment, Planning Circular PS 20-002, 5 May 2020

Category: Principal judgment

Parties: Allen Group Developments Pty Ltd (Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
A Adams (Solicitor) (Applicant)
S Patterson (Solicitor) (Respondent)

Solicitors:
Mills Oakley (Applicant)

Wilshire Webb Staunton Beattie (Respondent)

File Number(s): 2022/0386046

Publication Restriction: No

JUDGMENT

- 1 COMMISSIONER: This appeal is bought pursuant to s 8.7(1) of the Environmental Planning and Assessment Act 1979 (the EPA Act) by the Applicant, Allen Group Developments Pty Ltd. The Applicant appeals the deemed refusal of their development application DA2022/0688 by the Respondent, Northern Beaches Council. The development application, as amended, seeks consent for demolition of existing structures and construction of a residential flat building and associated works at 33 and 35 Fairlight Street, Fairlight (Lot 8 & 9, Sec B DP 3742) (the site).
- 2 A conciliation conference was held between the parties pursuant to s 34 of the *Land and Environment Court Act 1979* (LEC Act) on 23 June 2023. I presided over the conciliation conference. Following the conciliation, the parties continued discussions and reached an agreement based on amended plans and documents. The amended plans and documents are listed at Annexure B. The parties' agreement is for the grant of consent to the application, as amended, subject to the conditions in Annexure A.
- 3 The key changes made to the development application include:
 - (a) Additional 500mm setback to unit 05 and 06;
 - (b) Reduced extent of paving within rear setback to allow for greater soft landscaping;
 - (c) 1m strip of natural ground is now being retained along the eastern and western boundaries;
 - (d) Reduced excavation at ground floor which resulted in a general reconfiguration of the carparking and associated services such as bin room relocated to Level 1, switch room relocated to behind lift core, reduced storage along north-eastern corner of parking area and reduced excavation to rear of unit 08 to allow for additional deep soil. Accessible parking spaces and bicycle storage also relocated.
 - (e) Reduced excavation at Level 1 with general reconfiguration of carparking as a result.

- (f) Internal unit 08 layout as a result of increased deep soil zone, including deletion of internal lift to unit 08.
- (g) General internal layout changes to apartments on Level 2 as a result of revised building envelope as follows:
 - (i) Deleted dining room pop outs from both east and west to ensure 5m side boundary setback achieved.
 - (ii) 1m sill introduced to east and west living room walls.
 - (iii) Balcony off kitchen of unit 04 deleted and replaced with deep soil.
 - (iv) Reconfigured layout to ensure natural light and ventilation to B4 of unit 03.
 - (v) South facing glazing shifted 900mm north.
 - (vi) Awning over balconies also shifted 900mm north.
 - (vii) Additional landscaped planters to eastern and western sides of Level 2 balconies.
 - (viii) Northern façade of unit 03 shifted 540mm north to accommodate request for tv/media room (now bed 4) to have natural light and ventilation.
- (h) Revised privacy screen to Level 2 to ensure privacy to units 03 and 04 as well as solar compliance to unit 04.
- (i) Awning partially removed from Level 3 plan (Level 2 roof elements) where pop outs have been deleted.
- (j) New window added to western living room wall for improved natural light.
- (k) Western bedroom wall on Level 3 shifted to provide increased side setback by 480mm. This resulted in internal revision to the unit 01 floor plan.
- (l) B1 unit 01 window pushed 600mm south to allow for small desk area.
- (m) Unit 02 configuration revised as a result of eastern bedroom wall shifted to provide increased side setback by 480mm.
- (n) New planter introduced to eastern edge of unit 02 balcony to provide additional terrace setback.
- (o) Clerestory windows over units 01 and 02 have been reduced in width as agreed and lowered by a total of 300mm.
- (p) Two additional clerestory windows have been deleted from the roof plan over bedrooms and replaced with some skylights over walk through robes.
- (q) Height lines added to elevations and section AA.

- (r) Adaptable layouts for apartments 03 and 04 updated in response to changes noted above.

4 As the presiding Commissioner, I am satisfied that the decision is one that the Court could have made 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 on the basis that:

- (1) The development application was lodged on 23 May 2022, as such the Environmental Planning and Assessment Regulation 2021 (EPA Regulation) applies. Pursuant to s 23 of the EPA Regulation the development application is made with the consent of the owners of the land.
- (2) State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience and Hazards) applies. As required by s 4.6 of SEPP Resilience and Hazards, consideration has been given as to whether the subject site is contaminated. The parties confirm that a review of the site history indicates that it has been used for residential purposes. The site is not identified as contaminated, or likely to be contaminated land. There is no indication of previous uses that would cause contamination. The development application does not propose a change of use. I accept that the site will be suitable for the proposed development.
- (3) Pursuant to Sch 7 of the EPA Regulation, the development is a BASIX affected building. The amended development application is accompanied by a BASIX certificate, complying with the requirements of State Environment Planning Policy (Building Sustainability Index: BASIX) 2004.
- (4) Pursuant to State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP BC) the site is located within the Sydney Harbour Catchment. The Development Application was lodged under the provisions of the SEPP BC, as they applied on 23 May 2022. At that time, Ch 10 of the SEPP BC contained provisions relating to the Sydney Harbour Catchment. Those provisions continue to apply: s 6.65 SEPP BC.
- (5) In am satisfied that pursuant to s 10.10 of SEPP BC, the development is consistent with the planning principles for land within the Sydney Harbour Catchment as the development:
 - (i) Includes stormwater and flooding mitigation measures that will, at a minimum maintain the existing water flow patterns, water quality, hydrological, ecological and geomorphological processes;
 - (ii) Will maintain any of the natural assets of the catchment that are located within the site;
 - (iii) Is permissible with consent on the site, generally complies with the principal development standards and will not

result in any significant adverse impacts associated with cumulative environmental impacts;

- (iv) Does not result in an unacceptable visual impact as viewed from waterways or foreshores; and
 - (v) Does not result in a reduction in the number of publicly accessible vantage points for viewing Sydney Harbour.
- (6) State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65) applies as the development application comprises a residential flat building: cl 4(1) SEPP 65. The amended development application is accompanied by a statement that confirms that: first, the qualified designer designed or directed the design of the development; and second how the design quality principles are achieved; finally how the objectives in Parts 3 and 4 of the Apartment Design Guide have been achieved.
- (7) Manly Local Environmental Plan 2013 (LEP 2013) applies to the land which is zoned R1 General Residential. Development for the purposes of a residential flat building is permitted with consent in the zone. In determining the development application, I have given consideration to the objectives of the zone which are:
- To provide for the housing needs of the community.
 - To provide for a variety of housing types and densities.
 - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- (8) Pursuant to cl 4.3 of LEP 2013, the site is subject to a maximum height of buildings control of 8.5m. The amended development application is non-compliant with this control and seeks to exceed the control between 110 and 1200mm. The applicant relies on a written request prepared by BBF Town Planners dated 28 July 2023 in support of the variation to the standard which addresses the matters set out at cl 4.6(3) of LEP 2013 including having regard to the tests set out in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118.
- (a) Pursuant to cl 4.6(4)(a) of LEP 2013, the Court, in exercising the functions of the consent authority, must be satisfied of both of the matters in subcll 4.6(4)(a)(i) and (ii), being:
 - (i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out ...
 - (b) Only if the requirements in subcll 4.6(3) and (4) are met will the power in subcl 4.6(2), to grant consent to development that contravenes the development standard, be enlivened: *RebelMH*

Neutral Bay Pty Ltd v North Sydney Council [2019] NSWCA 130 per Preston CJ at [23].

- (c) I am satisfied, for the reasons outlined in the written request, that it is unreasonable and unnecessary to comply with the height control in the circumstances of this case as the objectives of the standard are met, notwithstanding the non-compliance. Further, I am satisfied that the grounds advanced in the written request are sufficient environmental planning grounds to justify contravening the development standard.
 - (d) I am also satisfied that the proposed development will be in the public interest because it is consistent with the relevant objectives of the development standard and the objectives for development within the R1 General Residential Zone in which the development is proposed to be carried out.
 - (e) Finally, I accept after a consideration of the matters identified in cl 4.6(5) of LEP 2013, that the concurrence of the Planning Secretary is not required having regard to Planning Circular PS 20-002 dated 5 May 2020.
 - (f) Having regard to all of the above matters I am satisfied that I should uphold the cl 4.6 variation request in relation to the maximum height standard in LEP 2013.
- (9) The site is subject to a maximum floor space ratio (FSR) of 0.6:1 pursuant to cl 4.4 of LEP 2013. The amended development application has an FSR of 0.83:1, exceeding the standard. The Applicant relies on a written request prepared by BBF Town Planners dated 28 July 2023 in support of the variation to the standard which addresses the matters set out at cl 4.6(3) of LEP 2013 including having regard to the tests set out in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118:
- (a) The standards and legal principles that are noted at [8(a)] and [8(b)] apply.
 - (b) I am satisfied, for the reasons outlined in the written request, that it is unreasonable and unnecessary to comply with the FSR control in the circumstances of this case as the objectives of the standard are met, notwithstanding the non-compliance. Further, I am satisfied that the grounds advanced in the written request are sufficient environmental planning grounds to justify contravening the development standard.
 - (c) I am also satisfied that the proposed development will be in the public interest because it is consistent with the relevant objectives of the development standard and the objectives for development within the R1 General Residential zone in which the development is proposed to be carried out.
 - (d) Finally, I accept after a consideration of the matters identified in cl 4.6(5) of LEP 2013, that the concurrence of the Planning

Secretary is not required having regard to Planning Circular PS 20-002 dated 5 May 2020.

- (e) Having regard to all of the above matters I am satisfied that I should uphold the clause 4.6 variation request in relation to the maximum FSR standard in LEP 2013.
- (10) The site is located in the vicinity of a heritage item, being the sandstone kerbing along Fairlight Street. The development application is accompanied by a heritage assessment which concludes that due to the alignment of the proposed building the development will have minimal impact on the significance of the kerbing. As required by cl 5.10(4) of LEP 2013, in determining the development application I have considered the impact of the development on the significance of the heritage item.
- (11) As the development application proposes earthworks, cl 6.2 of LEP 2013 applies. The development application is accompanied by a Geotechnical Investigation Report prepared by JK Geotechnics, dated 30 August 2023. That report provides a detailed assessment of the impact of the proposed excavation and recommends appropriate measures to avoid, minimise or mitigate impacts. Compliance with the report is required by Annexure A. In determining the development application, I have given consideration to the matters at cl 6.2(3) of LEP 2013 and I am satisfied that none warrant the refusal of the development application.
- (12) The amended development application is accompanied by Civil Engineering Plans. Pursuant to cl 6.4 Stormwater Management, development consent must not be granted to development on land to which this clause applies unless the Court is satisfied of the matters listed at subcl (3), including the use of water permeable surfaces on land, on-site stormwater retention and any adverse impacts of stormwater runoff. The parties agree and I accept that I am able to be find that the matters at cl 6.4(3) of LEP 2013 are satisfied.
- (13) The site is identified on the Foreshore Scenic Protection Area map in LEP 2013. Pursuant to cl 6.9 Foreshore scenic protection area, development consent must not be granted to development on land to which this clause applies unless the Court is satisfied of the matters listed at subcl (3), including:
 - (a) impacts that are of detriment to the visual amenity of harbour or coastal foreshore, including overshadowing of the foreshore and any loss of views from a public place to the foreshore,
 - (b) measures to protect and improve scenic qualities of the coastline,
 - (c) suitability of development given its type, location and design and its relationship with and impact on the foreshore,
 - (d) measures to reduce the potential for conflict between land-based and water-based coastal activities.

- (14) The Statement of Environmental Effects accompanying the development application includes an assessment of the development application against these factors. The parties agree and I accept that I am able to find that the matters at cl 6.9(3) of LEP 2013 have been considered.
 - (15) Each of the services listed at cl 6.12 of LEP 2013 that are essential for the development are available.
- 5 Having reached the state of satisfaction that the decision is one that the Court could make in the exercise of its functions, s 34(3)(a) of the LEC Act requires me to “dispose of the proceedings in accordance with the decision”. The LEC Act also requires me to “set out in writing the terms of the decision” (s 34(3)(b)).
- 6 In making the orders to give effect to the agreement between the parties, the parties have not raised, and I am not aware of any jurisdictional impediment to the making of these orders. Further, I was not required to make, and have not made, any assessment of the merits of the development application against the discretionary matters that arise pursuant to an assessment under s 4.15 of the EPA Act.
- 7 The Court notes that:
 - (a) Northern Beaches Council, as the relevant consent authority, has agreed under section 38(1) of the Environmental Planning and Assessment Regulation 2021 to the Applicant amending Development Application No DA2022/0688, in accordance with the documents listed in Annexure B.
 - (b) The Applicant is not required to lodge the Amended Application on the NSW Planning Portal pursuant to section 38(4) of the EPA Regulation.
 - (c) The Applicant has filed the Amended Application with the Court.
- 8 The Court orders that:
 - (1) Pursuant to section 8.15(3) of the *Environmental Planning and Assessment Act 1979* the Applicant is to pay the costs of the Respondent that are thrown away as a result of the Applicant filing the Amended Application, in the agreed amount of \$10,000.00 within 28 days of these orders.
 - (2) The request pursuant to clause 4.6 of the Manly Local Environmental Plan 2013 to vary the development standard for height contained within clause 4.3 thereof, as prepared by BBF Town Planners dated 28 August 2023, is upheld.

- (3) The request pursuant to clause 4.6 of the Manly Local Environmental Plan 2013 to vary the development standard for floor space ratio contained within clause 4.4 thereof, as prepared by BBF Town Planners dated 28 August 2023, is upheld.
- (4) The appeal is upheld.
- (5) Development consent is granted to Development Application No DA2022/0688, which seeks consent for the demolition of existing structures and construction of a residential flat building and associated works at 33 and 35 Fairlight Street, Fairlight (Lot 8 & 9, Sec B DP 3742), subject to the conditions of consent in Annexure A.

D Dickson

Commissioner of the Court

Annexure A

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