



Land and Environment Court  
New South Wales

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Case Name: Pavillion Residences No 3 Pty Limited v Northern Beaches Council

Medium Neutral Citation: [2020] NSWLEC 1302

Hearing Date(s): Conciliation conference on 3 July 2020

Date of Orders: 22 July 2020

Decision Date: 22 July 2020

Jurisdiction: Class 1

Before: Dickson C

Decision: See orders at [7] below

Catchwords: DEVELOPMENT APPLICATION – conciliation conference – shop top housing – amended plans – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979  
Environmental Planning and Assessment Regulation 2000  
Land and Environment Court Act 1979  
Manly Local Environmental Plan 2013  
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004  
State Environmental Planning Policy (Infrastructure) 2007  
State Environmental Planning Policy No 55—Remediation of Land  
State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development  
Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005

Category: Principal judgment

Parties: Pavillion Residences No. 3 Pty Limited (Applicant)  
Northern Beaches Council (Respondent)

Representation: Counsel:  
M Staunton (Applicant)  
D Loether (Solicitor) (Applicant)  
J Ede (Solicitor) (Respondent)

Solicitors:  
Bartier Perry (Applicant)  
Wilshire Webb Staunton Beattie (Respondent)

File Number(s): 2019/407794

Publication Restriction: Nil

## JUDGMENT

- 1 **COMMISSIONER:** The Applicant, Pavillion Residences No 3 Pty Limited, appeals pursuant to the provisions of s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal by Northern Beaches Council of Development Application No. DA/2018/1669. The development application, as amended, seeks consent for demolition and construction of a five storey shop top housing development comprising a ground floor retail premises and 8 residential apartments. The development includes strata subdivision. The development is proposed at 21 Whistler Street, Many (Lot B in DP 368451) (the Site).
- 2 In exercising the functions of the consent authority on the appeal, the Court has the power to determine the development application pursuant to s 4.16 of the EPA Act.
- 3 The Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (the LEC Act) between the parties, which was held on 3 July 2020. Through the conciliation process, the parties have agreed to an amended design for the development and an agreement under s 34(3) of the LEC Act has been reached between the parties as to the terms of a decision in the proceedings that would be acceptable to them. The decision agreed upon is to uphold the appeal and to grant development consent subject to conditions of consent, pursuant to s 4.16 of the EPA Act.

4 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 have formed this state of satisfaction for the following reasons:

- (1) The development application was lodged with the consent of the owner of the land to which the development relates: cl 49 of the Environmental Planning and Assessment Regulation 2000 (the Regulation).
- (2) As required by cl 7(1) of the State Environmental Planning Policy No 55—Remediation of Land, consideration has been given as to whether the subject site is contaminated. In determining the application, I have considered whether the land is contaminated and, on account of the land being historically used for residential purposes, I am satisfied that: there is no evidence that the site poses a risk of contamination; no further investigation of the site is warranted in the circumstances; and the site is considered to be suitable for the proposed development.
- (3) State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65) applies to the development. The application is accompanied by a design verification statement as required by cl 50 of the Regulation.
- (4) A BASIX certificate has been provided to satisfy the requirement in Schedule 1 of the Regulation and State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.
- (5) Pursuant to cl 3 of the Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (SREP) and the associated Sydney Harbour Catchment Map the site is located within the Sydney Harbour Catchment. However, the site is not located within the Foreshores and Waterways Area or a wetlands protection area and is not identified as a strategic foreshore site or a heritage item listed under the SREP. The site is also not located in the vicinity of a heritage item listed under the SREP. I am satisfied that the proposed development is satisfactory with respect to the SREP.
- (6) Clause 45(2) of State Environmental Planning Policy (Infrastructure) 2007 applies to the proposed development and requires that the consent authority give written notice to the electricity supply authority for the area and consider any response to the notice that is received within 21 days after the notice is given. The Respondent, as consent authority, gave notice of the proposed development to Ausgrid, who raises no objection.
- (7) Pursuant to the Manly Local Environmental Plan 2013 (LEP 2013) the subject site is zoned B2 Local Centre. The proposed development is for the purpose of 'shop top housing' as defined in the LEP 2013. Shop top housing and commercial premises are permissible with development consent in the B2 Local Centre zone. I have had regard to the objectives of the zone in determining the application.

- (8) Pursuant to cl 4.3(2) and the Height of Buildings Map of the LEP 2013, the maximum Height applicable to the site is 15 metres. The proposed development will result in a maximum building height of 17.2 metres. Accordingly, the Applicant relies on a request to vary the Height development standard, prepared by Boston Blyth Fleming Town Planners and dated 15 May 2020, pursuant to cl 4.6 of the LEP 2013. I reviewed the request and in accordance with cl 4.6 of the LEP 2013, I am satisfied that:
- (a) The written request demonstrates that compliance with the height development standard is unreasonable and unnecessary as the objectives of the height development standard are met notwithstanding the noncompliance (cl 4.6(3)(a) of the LEP 2013).
  - (b) The written request adequately establishes sufficient environmental planning grounds that justify the breach of the height standard (cl 4.6(3)(b) of the LEP 2013).
  - (c) On the preceding basis I am satisfied that the requirements of cl 4.6(4)(a)(i) of the LEP 2013 are met.
  - (d) For the reasons outlined in the written request I am satisfied that the development is in the public interest as it is consistent with the objectives of the B2: Local Centre zone and the development standard. On this basis I am satisfied that the requirements of cl 4.6(4)(a)(ii) of the LEP 2013 are met.
  - (e) Pursuant to cl 4.6(5) of LEP 2013 I am satisfied the proposal is not considered to raise any matter of significance for State or regional development.
  - (f) The states of satisfaction required by cl 4.6 of the LEP 2013 have been reached and there is therefore power to grant development consent to the proposed development notwithstanding the breach of the height control.
- (9) Pursuant to cl 6.2(3) of the LEP 2013, prior to the grant of any development consent for earthworks the consent authority must consider the matters identified within that clause. These matters are addressed in the Report on Preliminary Geotechnical Site Investigation prepared by Crozier Geotechnical Consultants and dated October 2018. I am satisfied that the matters identified under cll of LEP 2013 6.2(3)(a) to (h), where relevant, have been suitably addressed.
- (10) Pursuant to cl 6.4(3) of the LEP 2013, development consent must not be granted unless the consent authority is satisfied of matters identified within that clause. I am satisfied that these matters are addressed through the stormwater drainage plans that were filed with the DA and the imposition of conditions of consent.
- (11) Pursuant to cl 6.9(3) of the LEP 2013, development consent must not be granted unless the consent authority has considered matters identified within that clause relating to the impacts of development on,

and protection of the scenic qualities of, foreshore and coastal areas. I am satisfied that matters identified under cl of LEP 2013 6.9(3)(a) to (c) have been suitably addressed.

- (12) Pursuant to cl 6.11(3) of the LEP 2013, development consent must not be granted for the erection of a building unless the consent authority is satisfied that the proposed development will provide an active street frontage (as defined under cl 6.11(5) of the LEP 2013). All floor space at ground floor level (but for elements excluded under cl 6.11(4) of the LEP 2013) is proposed to be used for the purpose of business premises or retail premises. I am satisfied that the proposed development provides an active street frontage.
- (13) Pursuant to cl 6.12(1) of the LEP 2013, development consent must not be granted to development unless the consent authority is satisfied that the nominated relevant essential services for the development are available to the site. I am satisfied that the relevant essential services for the development are available to the site.
- (14) Pursuant to cl 6.13(3) of the LEP 2013, development consent must not be granted unless the consent authority considers that a development exhibits design excellence. I am satisfied that the proposed development, as amended, exhibits design excellence.
- (15) Pursuant to cl 6.16(3) of the LEP 2013, development consent must not be granted to the erection of a building on land in Zone B2 Local Centre unless the consent authority is satisfied that at least 25% of the gross floor area of the building will be used as commercial premises. The Proposal will result in 18.7% (152sqm) of the gross floor area of the proposed building being used for commercial premises. Accordingly, the Applicant relies on a request to vary the development standard, prepared by Boston Blyth Fleming Town Planners and dated 15 May 2020, pursuant to cl 4.6 of the LEP 2013. I reviewed the request and in accordance with cl 4.6 of the LEP, I am satisfied that:
  - (a) The written request demonstrates that compliance with the development standard is unreasonable and unnecessary as the objectives of the development standard are met notwithstanding the noncompliance (cl 4.6(3)(a) of the LEP 2013).
  - (b) The written request adequately establishes sufficient environmental planning grounds that justify the breach of the standard (cl 4.6(3)(b) of the LEP 2013).
  - (c) On the preceding basis I am satisfied that the requirements of cl 4.6(4)(a)(i) of the LEP 2013 are met.
  - (d) For the reasons outlined in the written request I am satisfied that the development is in the public interest as it is consistent with the objectives of the B2: Local Centre zone and the development standard. On this basis I am satisfied that the requirements of cl 4.6(4)(a)(ii) of the LEP 2013 are met.

- (e) Pursuant to cl 4.6(5) of LEP 2013 I am satisfied the proposal is not considered to raise any matter of significance for State or regional development.
  - (f) The states of satisfaction required by cl 4.6 of the LEP 2013 have been reached and there is therefore power to grant development consent to the proposed development notwithstanding the breach of the control.
- (16) The DA lodged with the Respondent was placed on notification from 31 October 2018 to 17 November 2018. The Respondent received no submissions in objection to the Proposal.
- 5 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.
- 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 final orders to give effect to the parties' agreement under s 34(3) of the LEC Act are:
- (1) The Applicant is granted leave to amend Development Application No. DA2018/1669 and to rely upon the following amended plans and documents, copies of which are included at Annexure A:

<b>Plan Reference</b>	<b>Prepared by</b>	<b>Date</b>
Drawing No. DA01, revision D – Basement	Wolski Coppin Architecture	5 May 2020
Drawing No. DA02, revision D – Ground	Wolski Coppin Architecture	5 May 2020
Drawing No. DA03, revision C – Level 1	Wolski Coppin Architecture	5 May 2020
Drawing No. DA04, revision C –	Wolski Coppin	5 May

Level 2	Architecture	2020
Drawing No. DA05, revision C – Level 3	Wolski Coppin Architecture	5 May 2020
Drawing No. DA06, revision C – Level 4	Wolski Coppin Architecture	5 May 2020
Drawing No. DA07, revision C – Roof	Wolski Coppin Architecture	5 May 2020
Drawing No. DA08, revision A – Section AA	Wolski Coppin Architecture	5 May 2020
Drawing No. DA09, revision A – Section BB	Wolski Coppin Architecture	5 May 2020
Drawing No. DA10, revision B – Easte Elevation	Wolski Coppin Architecture	5 May 2020
Drawing No. DA11, revision B – North Elevation	Wolski Coppin Architecture	5 May 2020
Drawing No. DA12, revision B – South Elevation	Wolski Coppin Architecture	5 May 2020
Drawing No. DA13, revision B – West Elevation	Wolski Coppin Architecture	5 May 2020
Drawing No. C06, revision B – Finishes	Wolski Coppin Architecture	19 May 2020
<b>Document Reference</b>	<b>Prepared by</b>	<b>Date</b>
Traffic and Parking Assessment	Transport and Traffic Planning	May 2020

	Associates	
NatHERS Compliance Certificate F96M7Q1S8Q	Senica Consultancy Group	3 October 2018
NatHERS Compliance Certificate 00VB9O20A4	Senica Consultancy Group	3 October 2018
NatHERS Compliance Certificate 4CEEIT3O2L	Senica Consultancy Group	3 October 2018
NatHERS Compliance Certificate 9CYD5R29VN	Senica Consultancy Group	3 October 2018
NatHERS Compliance Certificate BW2VH8T1CL	Senica Consultancy Group	3 October 2018
NatHERS Compliance Certificate DVV3MJSYN4	Senica Consultancy Group	3 October 2018
NatHERS Compliance Certificate KEOCEM3VXC	Senica Consultancy Group	3 October 2018
NatHERS Compliance Certificate Q64JOXDGAT	Senica Consultancy Group	3 October 2018
BCA Design Compliance Report	Private Certifiers	28



	Australia	September 2018
Energy Efficiency Assessment Report 2018/09097	Senica Consultancy Group	20 September 2018
Noise Impact Assessment	Acoustic Logic	6 September 2018
Waste Management Plan 2018/09035	Senica Consultancy Group	11 September 2018
Supplementary Statement of Environmental Effects and Attachments (clause 4.6 requests)	Boston Blyth Fleming Town Planners	15 May 2020

- (2) The Applicant's written request to vary the height of buildings development standard at clause 4.3(2) of the Manly Local Environmental Plan 2013, made pursuant to clause 4.6 of the Manly Local Environmental Plan 2013, is upheld.
- (3) The Applicant's written request to vary the development standard for gross floor area in Zone B2 at clause 6.16(3) of the Manly Local Environmental Plan 2013, made pursuant to clause 4.6 of the Manly Local Environmental Plan 2013, is upheld.
- (4) The appeal is upheld.
- (5) Development Application No. DA2018/1669 (as amended) for demolition works and construction of a five-storey shop top housing development including basement parking, use of the ground floor for commercial premises, eight residential apartments and strata subdivision on land identified as Lot B in Deposited Plan 368451 and known as 21 Whistler Street, Manly, be approved subject to the conditions included at Annexure B.

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**D M Dickson**

**Commissioner of the Court**

[Annexure A Part 1 \(24874546, pdf\)](#)

[Annexure A Part 2 \(594097, pdf\)](#)

[Annexure A Part 3 \(5060443, pdf\)](#)

[Annexure B \(209876, pdf\)](#)

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