



Land and Environment Court
New South Wales

Case Name: Landmark Group Australia Pty Ltd v Northern Beaches Council

Medium Neutral Citation: [2024] NSWLEC 1509

Hearing Date(s): Conciliation Conference on 12 June, 2, 9, July 2024

Date of Orders: 23 August 2024

Decision Date: 23 August 2024

Jurisdiction: Class 1

Before: Byrne AC

Decision: The Court orders that:
(1) The appeal is upheld.
(2) Development consent No DA2022/0145 is modified in the terms set out in Annexure A.
(3) Development consent No DA2022/0145, as modified by the Court, is subject to the consolidated modified conditions set out in Annexure B.

Catchwords: APPEAL – MODIFICATION – demolition and construction mixed use development - conciliation conference – agreement reached – orders made

Legislation Cited: Environmental Planning and Assessment Act 1979 (NSW), ss 4.15, 4.55, 8.9
Land and Environment Court Act 1979 (NSW), s 34
Environmental Planning and Assessment Regulation 2021, ss 98, 113
Warringah Local Environmental Plan 20101, cll, 4.3, 4.6

Cases Cited: North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468; [1998] NSWSC 163
Gann & Anor v Sutherland Shire Council [2008] NSWLEC 157

Category: Principal judgment

Parties: Landmark Group Australia Pty Ltd (Applicants)
Northern Beaches Council (Respondent)

Representation: Counsel:
R Bennett (Solicitor)(Applicant)
S Patterson (Solicitor)(Respondent)

Solicitors:
Pikes & Verekers Lawyers (Applicant)
Wilshire Webb Staunton Beattie (Respondent)

File Number(s): 2023/461575

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to s 8.9 of the *Environmental Planning and Assessment Act 1979* NSW (EPA Act) from the refusal by Northern Beaches Council (the Council) to modify development consent No DA2022/0145 for “demolition works and construction of a mixed-use development comprising a residential flat building and shop top housing, basement parking, lot consolidation and torrens title subdivision” (approved development) on land identified as 812 Pittwater Road and 4 Delmar Parade Dee Why NSW 2099, being Lot CP SP 32072 and Lot CP SP 32071 (the Site). The original consent was granted by the Sydney North Planning Panel on 17 July 2023.
- 2 The modification application sought to modify the approved development by internal and external modifications across all levels including introduction of a roof top communal open space (the MOD). Demolition and construction has commenced on Site.
- 3 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-site and at Council’s chambers. I presided over the conciliation conference.
- 4 At the conciliation conference the parties reached an agreement as to the terms of a decision in the proceedings that would be acceptable to the parties

and which addressed the Council's contentions. Council accordingly approved the amendment to the Applicant's modification application pursuant to s 113(1) of the Environmental Planning and Assessment Regulation 2021. The agreed position is for the Court to uphold the Class 1 appeal and amend the approved development consent to enable the Applicant to carry out the works in accordance with the internal and external changes the subject of the MOD, subject to the consolidated conditions in Annexure B.

- 5 Under s 34(3) of the LEC Act, I must dispose of the Class 1 proceedings in accordance with the parties' decision if it is a decision that the Court could have made in the proper exercise of its functions.
- 6 The parties' decision involves the Court exercising the function under s 4.55(2) of the EPA Act to grant the modification to the development consent No DA2022/0145.
- 7 There are jurisdictional pre-requisites which require my satisfaction before the power to grant consent under s 4.55(2) of the EPA Act can be exercised by the Court. The parties outlined jurisdictional matters of relevance in an agreed Jurisdictional Statement ("the Statement") provided to the Court.

Satisfaction as to Jurisdiction

- 8 Taking into account the parties advice in the Statement, I am satisfied in regard to the jurisdictional matters set out below.
- 9 The modification application was lodged with the consent in writing from Arash Tavakoli who is the director of Landmark Group Australia Pty Ltd which is the owner of the Site as required under s 98(1) of the Environmental Planning and Assessment Regulation 2021.

Section 4.55 – Environmental Planning and Assessment Act 1979

- 10 The Modification Application and the Amended Modification Application were made pursuant to s 4.55(2) of the EPA Act. With reference to the legislation and relevant caselaw on the application of s 4.55 EPA Act, set out in the Statement, the parties agree that the proposed modification results in a development which is substantially the same as originally approved because the proposed modifications achieve, among other things:

- (1) “the proposed amendments are contained within the approved building envelope with only minor changes to the approved building setback and building separation arrangements;
 - (2) the approved development comprised 219 units and the modifications propose 218 units with a minor change to the unit mix.”
- 11 With respect to building height, the proposal involves an increase to accommodate increased provision of ceiling services, as well as the addition of a common roof terrace space on the Pittwater Road building.
- 12 In the Statement the parties address this issue as follows:

“In *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468 (*Michael Standley*) the Court of Appeal considered whether the consent authority may modify a consent that (as modified) authorises development that is prohibited at the time of modification, and whether State Environmental Planning Policy No 1 (now cl 4.6) regulates the procedure for doing so. It was held at [481]:

Section 102 [now s 4.55] is a free-standing provision. A modification application may be approved notwithstanding the development would be in breach of an applicable development standard were it is the subject of an original development application. And s 102(3A)[now s4.55(3)] controls the way in which the consent authority takes into account the development standards found in any environmental planning instrument.

The position in *Michael Standley* was further supported in *Gann & Anor v Sutherland Shire Council* [2008] NSWLEC 157 (*Gann*).

The applicable height standard pursuant to cl 4.3 of *Warringah Local Environmental Plan 2011* is exempt from variation, when granting development consent, pursuant to cl 4.6(8A) of *Warringah Local Environmental Plan 2011*. Nevertheless it is a development standard. The proposed communal roof terrace does not comply with the building height development standard. The authority in *Michael Standley* and *Gann* applies and therefore the development consent can be modified to exceed the development standard, as long as the development is substantially the same. The parties agree that the modified development will be substantially the same as the development consent which was originally granted.”

- 13 In summary, the parties agree and the Court accepts that:
- The development to which the Consent as modified relates is substantially the same development as the development for which the Consent was originally granted;
 - The Modification Application was appropriately notified; and
 - Submissions received in response to the notification of the Modification Application were considered.

- 14 Pursuant to s 4.55(3) of the EPA Act, the Council considered the amended Modification Application against:
- Such of the matters referred to in s 4.15(1) of the EPA Act as are of relevance to the proposal, as amended; and
 - The reasons given by the consent authority for the grant of the Consent.

State and Local Environmental Planning Instruments

- 15 Statutory planning controls applicable to the Site and the proposed development were considered by the Respondent in the previous assessment undertaken for the grant of consent. The modification proposed by this application does not raise any new jurisdictional issues which would alter previous conclusions at the development assessment stage such that I am required to re-consider each of the relevant Environmental Planning Instruments and planning controls. I refer to the analysis undertaken in the Statement and accept the agreed position of the parties.
- 16 I note that a Design Verification Statement and an amended BASIX Certificate have been provided in accordance with the Environmental Planning and Assessment Regulation 2021.

Conclusion

- 17 Based on the evidence before me, my observations on site and oral submissions made to me on site, I am satisfied that there is no jurisdictional impediment to the making of the proposed orders., and the decision is one 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. 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.

Notations

- 18 The Court notes that:
- (1) Northern Beaches Council as the relevant consent authority for the purposes of s 113 of the Environmental Planning and Assessment Regulation 2021 consents to the Applicant amending the modification application to incorporate the following amended plans and documentation:

(a) Architectural Plans prepared by Rothe Lowman as follows:

| Drawing No. | Plan Title | Revision | Dated |
|-------------|-------------------------|----------|----------|
| TP00.00 | Cover Sheet | H | 24.06.24 |
| TP00.02 | Demolition Plan | D | 24.06.24 |
| TP00.03 | Site Survey Plan | D | 24.06.24 |
| TP00.04 | Site Plan | F | 24.06.24 |
| TP00.05 | Site Analysis Plan | F | 24.06.24 |
| TP00.07 | Bulk Excavation Diagram | E | 24.06.24 |
| TP01.01 | Basement 2 | J | 24.06.24 |
| TP01.02 | Basement 1 | J | 24.06.24 |
| TP01.03 | Ground | K | 24.06.24 |
| TP01.04 | Level 1 | J | 24.06.24 |
| TP01.05 | Level 2 | K | 24.06.24 |
| TP01.06 | Level 3 | J | 24.06.24 |
| TP01.07 | Level 4 | J | 24.06.24 |
| TP01.08 | Level 5 | J | 24.06.24 |
| TP01.09 | Level 6 | J | 24.06.24 |
| TP01.10 | Level 7 | J | 24.06.24 |
| TP.01.11 | Level 8 | J | 24.06.24 |

| | | | |
|---------|--|---|----------|
| TP02.05 | Site Elevations | J | 24.06.24 |
| TP02.06 | Site Elevations | J | 24.06.24 |
| TP03.01 | Sections | H | 24.06.24 |
| TP03.02 | Sections 2 | G | 24.06.24 |
| TP05.01 | Shadow Analysis – POV | F | 24.06.24 |
| TP05.02 | Shadow Analysis – POV | F | 24.06.24 |
| TP05.03 | Shadow Plans – Winter | E | 24.06.24 |
| TP05.04 | Shadow Plans – Winter | E | 24.06.24 |
| TP05.05 | Shadow Plans – Winter | E | 24.06.24 |
| TP05.06 | Shadow Plans – Winter | E | 24.06.24 |
| TP06.01 | GFA Plans | G | 24.06.24 |
| TP06.03 | Deep Soil | F | 24.06.24 |
| TP06.04 | Communal / Landscape Plan | G | 24.06.24 |
| TP06.05 | SEPP 65 Solar & Cross Ventilation Compliance | F | 24.06.24 |
| TP06.21 | Storage Schedule | F | 24.06.24 |
| TP06.31 | Adaptable Plans | F | 24.06.24 |
| TP06.32 | Adaptable Plans | F | 24.06.24 |

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|---------|-----------------------------------|---|----------|
| TP06.33 | Adaptable Plans | F | 24.06.24 |
| TP06.34 | Adaptable Plans & LHA Schedule | C | 24.06.24 |
| TP06.40 | Commercial Adaptations | D | 24.06.24 |
| TP10.01 | Development Summary | G | 24.06.24 |

- (b) Design Verification Statement prepared by Rothe Lowman dated 26 June 2024;
- (c) SEPP 65 Statement prepared by Rothe Lowman dated 26 June 2024; and
- (d) BASIX Certificate No. 1250181M_08 prepared by SLR Consulting Pty Ltd dated 26 June 2024.

Orders

19 The Court orders that:

- (1) The appeal is upheld;
- (2) Development consent DA2022/0145 is modified in the terms in Annexure A;
- (3) Development consent DA2022/0145 as modified by the Court is Annexure B.

L Byrne

Acting Commissioner of the Court

Annexure A

Annexure B

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.