



Land and Environment Court
New South Wales

Case Name: The Trustee for My Manly Vale Unit Trust trading as My Manly Vale Pty Ltd v Northern Beaches Council

Medium Neutral Citation: [2022] NSWLEC 1137

Hearing Date(s): Conciliation Conference on 10 March 2022

Date of Orders: 18 March 2022

Decision Date: 18 March 2022

Jurisdiction: Class 1

Before: Gray C

Decision: The Court Orders that:
(1) The appeal is upheld.
(2) Development Application No. DA2021/0179 for demolition of existing structures and construction of a four (4) storey boarding house containing 37 boarding rooms, including a manager's room and car parking on land legally comprising of the allotment described as Lot 8 DP604034, known as 255 Condamine Street, Manly Vale is approved subject to the conditions set out in Annexure "A" to this agreement.

Catchwords: APPEAL – development application – boarding house – conciliation conference – agreement reached – orders made

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 8.7, 4.15, 4.16
Environmental Planning and Assessment Regulation 2000, cl 55, Sch 1
Land and Environment Court Act 1979, s 34
Roads Act 1993 s 138
State Environmental Planning Policy (Affordable Rental Housing) 2009, cl 29, 30
State Environmental Planning Policy (Housing) 2021

State Environmental Planning Policy (Resilience and Hazards) 2021 cl 4.6
State Environmental Planning Policy (Transport and Infrastructure) 2021 cl 2.118, 2.119
Warringah Local Environmental Plan 2011, cl 4.3, 4.6, 5.21, 6.1, 6.4
Water Management Act 2000 s 91

Category: Principal judgment

Parties: The Trustee for My Manly Vale Unit Trust trading as My Manly Vale Pty Ltd (Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
G McKee (Solicitor) (Applicant)
S Patterson (Solicitor) (Respondent)

Solicitors:
McKees Legal Solutions (Applicant)
Wilshire Webb Staunton Beattie (Respondent)

File Number(s): 2021/153523

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This appeal concerns a development application for the demolition of existing structures and the construction of a four-storey boarding house containing 37 boarding rooms, including a manager's room with car parking, at 255 Condamine Street, Manly Vale. Following the expiry of the period after which a development application is deemed to be refused, the applicant lodged an appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act). The development application was subsequently refused by the Northern Beaches Local Planning Panel on 21 July 2021. In exercising the functions of the consent authority on the appeal, the Court has the power to determine the development application pursuant to ss 4.15 and 4.16 of the EPA Act. The final orders in this appeal, outlined in [11] below, are made as a result of an agreement between the parties that was reached at a conciliation conference.

- 2 The Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 10 March 2022. I presided over the conciliation conference.
- 3 Following the conciliation conference, an agreement under s 34(3) of the LEC Act was reached between the parties as to the terms of a decision in the proceedings that was acceptable to the parties. The signed agreement was filed on 11 March 2022 and is supported by a joint jurisdictional note provided by the parties on the same date. The agreement was reached as a result of amendments to the development application, which were lodged on the NSW Planning Portal on 10 March 2022 with the agreement of the Council, as required by cl 55(1) of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation 2000). I note that despite the repeal of the EPA Regulation 2000, it continues to apply to the present development application, pursuant to Sch 6 cl 3 of the Environmental Planning and Assessment Regulation 2021.
- 4 The decision agreed upon is for the grant of development consent subject to conditions of consent pursuant to s 4.16(1) of the EPA Act. As the presiding Commissioner, I am satisfied that the decision to grant development consent to the amended application subject to conditions of consent is a decision 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 formed this state of satisfaction as each of the jurisdictional preconditions identified by the parties is met, for the following reasons:
 - The site is zoned B2 Local Centre under the Warringah Local Environmental Plan 2011 (WLEP), and development for the purpose of a boarding house is permissible in the zone.
 - I am satisfied that consent should be granted notwithstanding the contravention of the height development standard. The development standard establishes a maximum height of 11m, pursuant to cl 4.3 of the WLEP. The proposed maximum height of between 14.15m and 18.7m represents a contravention up to 7.7m above the numerical standard. The contravention arises primarily because the natural ground level (existing) is the bed of Burnt Bridge Creek, which runs through the site. I am satisfied that the written request dated 25 October 2021, lodged pursuant to cl 4.6 of the WLEP, adequately establishes sufficient environmental planning grounds that justify the breach in the height development standard by demonstrating that the breach arises from the

requirement for the building to be raised above the flood planning level of 11.7m AHD, and that the four-storey design achieves an appropriate contextual fit having regard to the character of 4-storey development established on the western side of Condamine Street. I am also satisfied that the written request demonstrates that compliance with the standard is unreasonable and unnecessary given that the proposal is consistent with the objectives of the standard, notwithstanding the non-compliance, and as there is no impact caused by the breach of the standard. Further, I am satisfied, based on the written request, that the proposal is in the public interest because it is consistent with the objectives of the zone and of the standard.

- Clause 5.21 of the WLEP, concerning flood planning, applies to the site, and development consent must not be granted unless the Court, exercising the functions of the consent authority, is satisfied of the matters in cl 5.21(2). Based on the jurisdictional note and the flood assessment dated February 2021, I am satisfied that the requirements of cl 5.21(2) have been met by the design of the floor levels above the flood planning level, the construction of piers and structures that are compatible with the flood behaviour, the inclusion of sufficient shelter in place above the probable maximum flood level, and a design that will not change flows through the watercourse on the site.
- Clause 6.1 of the WLEP, which concerns acid sulfate soils, does not apply as the land is mapped Class 4 and Class 5, and the works do not meet the description in cl 6.1(2) for Class 4 or Class 5. Nevertheless, a Preliminary Acid Sulphate Soils Assessment, dated February 2021 indicates that the site will be affected by acid sulphate soils and an Acid Sulfate Soil Management Plan is required to be complied with by the conditions of consent.
- Clause 6.4 of the WLEP applies to the site and concerns development on sloping land. It requires the consent authority to be satisfied of the matters in cl 6.4(3). Based on the Preliminary Geotechnical Assessment, dated February 2021, and the letters of Martens Consulting Engineers dated 21 April 2021 and 2 December 2021, I am satisfied of the matters in cl 6.4(3).
- The provisions of the State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH) apply to the development. At cl 30, consent cannot be granted unless certain requirements are met. Based on the agreed statement on jurisdictional note and on the architectural plans, I am satisfied that each of the matters in cl 30(1) of the SEPP ARH are met by the proposed development.
- Clause 30A of the SEPP ARH requires consideration of “whether the design of the development is compatible with the character of the local area”. I am satisfied that the four-storey stepped form of the proposed development is compatible with the character of the local area.
- The State Environmental Planning Policy (Housing) 2021 (SEPP (Housing)) commenced on 26 November 2021. Schedule 7 includes a savings provision, the effect of which is that the provisions of the SEPP ARH continue to apply to the development application. The SEPP (Housing) includes development standards for the number of parking spaces for boarding houses, with which the development complies.

- Consideration has been given as to whether the subject site is contaminated as required by cl 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021. Based on the Detailed Site Investigation (DSI) report dated 21 January 2021, the site can be made suitable for the development, subject to ensuring that the fill removal is carried out with a formal waste classification assessment as a result of asbestos on the site.
 - The site has frontage to Condamine Street, which is a classified road, and cl 2.118 and 2.119 of State Environmental Planning Policy (Transport and Infrastructure) 2021 apply. In accordance with cl 2.118, it is not practicable to provide vehicular access by a road other than the classified road, but, based on the Traffic and Parking Assessment Report dated 17 February 2021, I am satisfied that the safety, efficiency, and ongoing operation of the classified road will not be adversely affected by the development as a result of the vehicular access or the emissions from the development. Consistent with the requirements of cl 2.118(2)(c) and cl 2.119(3), the proposed development has been designed to prevent or reduce the impacts associated with road traffic noise and will be carried out in accordance with the recommendations in the Acoustic Report by Acoustic Dynamics that will ensure a suitable degree of amenity for occupants of the boarding house, including compliance with the LAeq levels in cl 2.119(3).
 - The amended development application is accompanied by a BASIX Certificate in accordance with the requirements of Sch 1 of the EPA Regulation 2000.
 - The development application was notified by the Council between 22 March 2021 and 21 April 2021, and the submissions received have been considered, with some additional conditions of consent agreed upon to address issues concerning car parking.
- 5 I note also that cl 29 of the SEPP ARH sets out a number of grounds on which consent cannot be refused if certain criteria are met. The proposed development meets the criteria for solar access, private open space, and accommodation size. Accordingly, consent cannot be refused on any of those grounds.
- 6 The development application includes works over, and within the creek line (Burnt Bridge Creek), constituting integrated development under s 91 of the *Water Management Act 2000*. The development application was referred to Natural Resource Access Regulator (NRAR) and NRAR issued General Terms of Agreement on 1 March 2022, which are incorporated into the consent by condition 2 of the conditions of consent.
- 7 The concurrence of Transport for New South Wales (“TfNSW”) is also required pursuant to s 138 of the *Roads Act 1993*. The development application was referred to TfNSW and they provided recommended conditions of consent,

which have been incorporated into the consent by condition 2 of the conditions of consent.

- 8 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)).
- 9 In making the orders to give effect to the agreement between the parties, 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.
- 10 The Court notes that:
 - (1) Northern Beaches Council, as the relevant consent authority has agreed, under clause 55(1) of the Environmental Planning and Assessment Regulation 2000, to the applicant amending the development application Number DA2021/0179 filed with the Court on 28 May 2021 with the plan listed in Condition 1 of the Conditions of Consent provided as Annexure ‘A’ to this agreement.
 - (2) The respondent uploaded the amended development application on the NSW planning portal on 11 March 2022.
 - (3) The applicant filed the amended application with the Court on 11 March 2022.

Orders

- 11 The Court orders that:
 - (1) The appeal is upheld.
 - (2) Development Application No. DA2021/0179 for demolition of existing structures and construction of a four (4) storey boarding house containing 37 boarding rooms, including a manager’s room and car parking on land legally comprising of the allotment described as Lot 8 DP604034, known as 255 Condamine Street, Manly Vale is approved subject to the conditions set out in Annexure “A” to this agreement.

J Gray

Commissioner of the Court

(Annexure) (580640, pdf)

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.