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For trim please.

Land and Environment Court

New South Wales

Case Name:	Sanderson v Northern Beaches Council
Medium Neutral Citation:	[2020] NSWLEC 1284
Hearing Date(s):	4 and 17 June 2020
Date of Orders:	02 July 2020
Decision Date:	2 July 2020
Jurisdiction:	Class 1
Before:	Gray C
Decision:	The Court orders that: (1) The appeal is upheld. (2) Development consent is granted for the consolidation of the two lots known as Lot 9 of DP 242284 and Lot 36 of Sec 1 DP 6462, and the subdivision of the consolidated lot into two lots of land, subject to the conditions of consent in Annexure A. (3) Exhibits 1-6 and 9 are returned.
Catchwords:	APPEAL – development application – subdivision of land – Voluntary Planning Agreement for the construction of a turning bay and the dedication of land – contentions resolved – resident submissions
Legislation Cited:	Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Regulation 2000 Land and Environment Court Act 1979 Pittwater Local Environmental Plan 2014
Cases Cited:	Calardu Penrith Pty Ltd v Penrith City Council [2010] NSWLEC 50 Parrott v Kiama Municipal Council [2004] NSWLEC 77 Radray Constructions Pty Ltd v Hornsby Shire Council (2006) 145 LGERA 292; [2006] NSWLEC 155

	Sanctuary Investments Pty Ltd v Baulkham Hills Shire Council (2006) 153 LGERA 355; [2006] NSWLEC 733 SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs 228 CLR 152; [2006] HCA 63
Texts Cited:	Northern Beaches Community Participation Plan Pittwater 21 Development Control Plan
Category:	Principal judgment
Parties:	Eric Sanderson (First Applicant) Jill Sanderson (Second Applicant) Northern Beaches Council (Respondent)
Representation:	Counsel: M Staunton (Applicants) F Berglund (Respondent) Solicitors: Sattler and Associates Pty Ltd (Applicants) Northern Beaches Council (Respondent)
File Number(s):	2018/391777
Publication Restriction:	No

JUDGMENT

1 **COMMISSIONER**: The property known as 66 Powderworks Road, North Narrabeen, is a large site that starts at its frontage to Powderworks Road to the north, and continues south beyond Bellara Avenue. Between this property and the dead-end of Bellara Avenue is a small, irregularly shaped property known as 31 Bellara Avenue, North Narrabeen. This appeal concerns a development application lodged with Northern Beaches Council ("the Council") for the consolidation of the two lots and the re-subdivision of the consolidated lot into two lots of land, with one site retaining frontage to the north to Powderworks Road, and the other site retaining frontage to Bellara Avenue. The appeal is lodged by Mr and Mrs Sanderson ("the applicants") pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* ("EPA Act"). Each of the contentions raised by the Council on appeal has been resolved, and there are no remaining contentions that warrant the refusal of the development application. The Council now agrees that development consent can be granted,

subject to appropriate conditions. Nevertheless, in exercising the functions of the consent authority on the appeal, the Court is required to determine the development application pursuant to ss 4.15 and 4.16 of the EPA Act.

2 The two lots, as currently configured, are shown in the survey at Figure 1. Lot 9 of DP 242284, known as 31 Bellara Avenue, is currently 265.5m2 and Lot 36 of Sec 1 DP 6462, known as 66 Powderworks Road, is 1958m2.

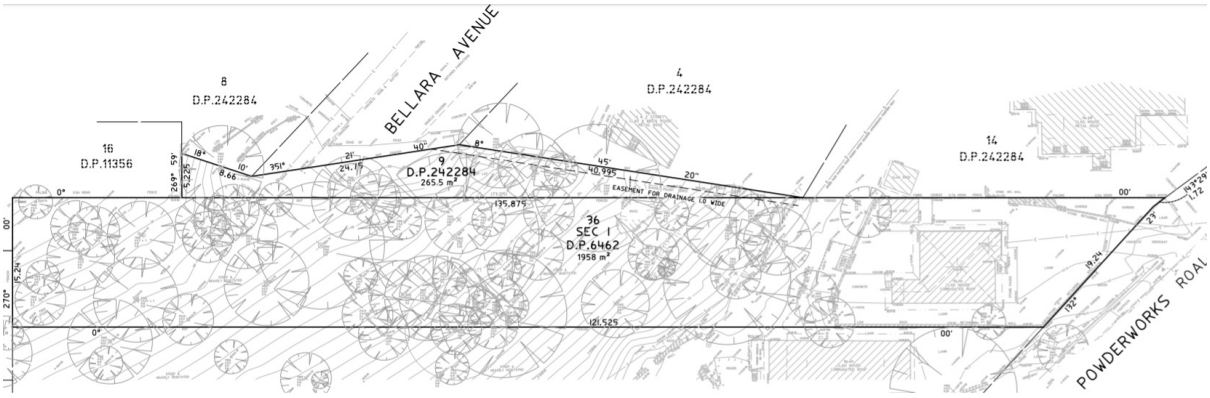

Figure 1: Current lot configuration (Source: Survey Plan by CMS Surveyors)

3 The proposed development seeks to adjust the boundary between the two lots, by the consolidation of the two lots and re-subdivision of the consolidated lot into two lots. There is no development consent sought for the construction of any dwellings, driveways or parking areas on either of the newly created lots. The proposed subdivision is shown at Figure 2, and results in proposed Lot 1 of 1615.9m2 fronting the dead-end of Bellara Avenue, and proposed Lot 2 of 607m2 fronting Powderworks Road. The proposed development also entails the removal a number of trees on proposed Lot 1, within an area identified for the building envelope for the future development of a dwelling and the driveway and parking area. There is no proposed change to the existing dwelling, which will be located on proposed Lot 2.

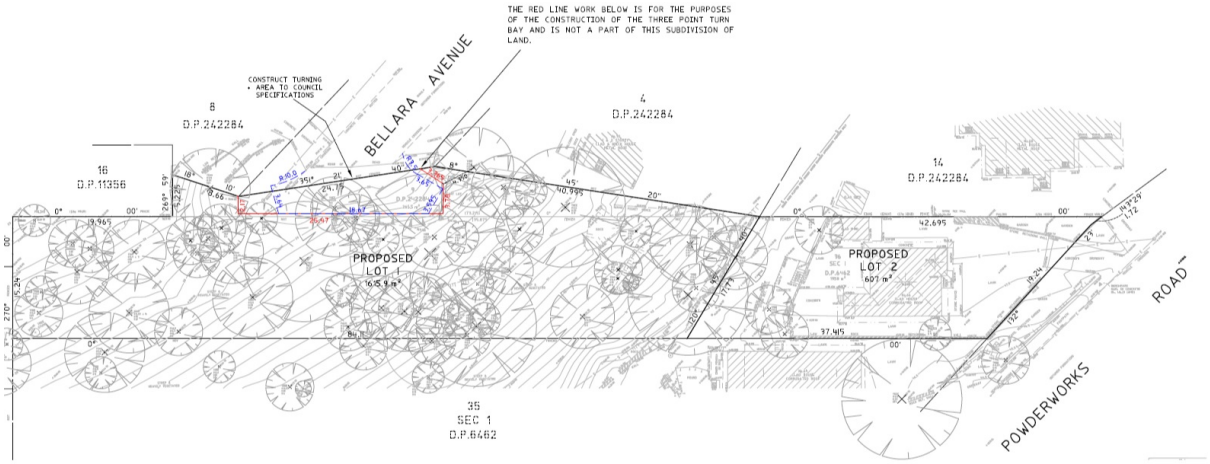

Figure 2: Proposed plan of subdivision (Source: Survey Plan Showing Proposed Subdivision dated 7 April 2020 by CMS Surveyors)

History of the appeal

4 The appeal was listed before me for a conciliation conference pursuant to s 34 of the *Land and Environment Court Act 1979* ("LEC Act"), which commenced with a site view on 29 August 2019. The parties were unable to reach an agreement at or following the conciliation, and the conciliation conference was terminated. In accordance with s 34(13) of the LEC Act, the parties subsequently consented to me hearing and disposing of the proceedings by way of court hearing pursuant to s 34C. They also agree that I can take into account everything that occurred at the conciliation conference, including what was observed at the site inspection and the submissions that were made by the local residents on site.

5 In the Statement of Facts and Contentions first filed in the proceedings on 8 August 2019, the Council raised a contention concerning the insufficient information on safe and functional access for vehicles. In particular, the Council raised an issue with respect to the limited turning area in the roadway at the end of Bellara Avenue, which constrains safe vehicular movements. Following the conciliation conference, the applicants amended the plan of subdivision to provide an area on proposed Lot 1 that could be used for vehicles to turn around ("turning bay") and amended their development application to include the construction of the turning bay and the structural retaining walls adjacent to it. This area is shown above in Figure 2. Leave was granted by the Assistant Registrar on 17 April 2020 for the applicants to amend the development application to rely on the revised plan of subdivision and include those works.

6 In addition, on 17 September 2019, the applicants made an offer to enter into a Voluntary Planning Agreement ("VPA") for the carrying out of the works for the turning bay and the dedication to the Council of the land on which the turning bay is located. Following the initial offer, negotiations took place, the result of which was a proposed final draft VPA ("the proposed VPA") that was endorsed by the Council at its meeting on 26 May 2020.

A description of the proposed development

7 The proposed development therefore includes the consolidation of the two lots and re-subdivision of the consolidated lot into proposed Lots 1 and 2, the removal of trees on proposed Lot 1 within the area identified for the building envelope and driveway, the construction of the turning bay and associated structural retaining walls, and the dedication of 101.4m2 of land from proposed Lot 1 to the Council pursuant to the proposed VPA.

The Council's position and the outcome of the appeal

8 As a result of the revised plan of subdivision and the agreement of the Council and the applicants to enter into the proposed VPA, the Council now agrees that development consent can be granted subject to appropriate conditions. The proposed conditions of consent are agreed between the parties. One such condition requires the proposed VPA to be entered and to be registered on the title of proposed Lot 1.

9 For the reasons that are set out below, I accept that development consent should be granted subject to conditions of development consent. I am satisfied of each of the requisite matters that arise under the applicable planning instrument, and I consider that the development is consistent with the relevant controls and that none of the matters raised by the resident objectors warrant refusal of the development application.

The site and the locality

10 The site, which comprises the two lots, is irregular in shape and has a combined area of 2223.5m2 and a site depth (measured from its frontage at Powderworks Road) of 121.5m. The boundaries of the site are adjoined by Powderworks Road to the north, detached dwelling houses to the south, east and west, and Bellara Avenue to the south-west. The site has six adjoining

properties that have addresses on Bellara Avenue, Powderworks Road and Nareen Parade.

11 The site currently contains one single storey detached dwelling amongst landscaping and bushland, which fronts Powderworks Road. The site slopes steeply from Powderworks Road down to the rear boundary, with a fall of 22.5m across the site's depth of 121.5m.

12 The immediate locality is characterised by detached dwellings surrounded by dense canopy trees, with large, moderately sloping allotments to the east and south. Bellara Avenue slopes steeply up to where it stops abruptly at the site, where an area of the site is cleared.

The relevant planning framework

13 Section 4.15(1)(a) of the EPA Act requires that the Court, in exercising the functions of the consent authority, consider the provisions of any applicable environmental planning instrument, development control plan, draft planning agreement that a developer has offered to enter into, and regulations. Amongst other things, s 4.15(1) also requires consideration of the likely impacts of the development, the suitability of the site for development, any submissions made, and the public interest.

14 The site is zoned E4 Environmental Living pursuant to the Pittwater Local Environmental Plan 2014 ("PLEP 2014"), and the subdivision of land is permissible with development consent pursuant to cl 2.6 of the PLEP 2014. Clause 2.3(2) of the PLEP 2014 requires the Court to "have regard to the objectives for development in a zone when determining a development application in respect of land within the zone". The zone objectives are as follows:

> • To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.
>
> • To ensure that residential development does not have an adverse effect on those values.
>
> • To provide for residential development of a low density and scale integrated with the landform and landscape.
>
> • To encourage development that retains and enhances riparian and foreshore vegetation and wildlife corridors.

15 Clause 4.1 of the PLEP 2014 imposes a minimum lot size for the subdivision of land, in accordance with the Lot Size Map. That is, the size of any lot resulting from a subdivision of land is not to be less than the minimum size shown on the Lot Size Map. Applying that map, the minimum lot size applicable to the area in which the site is located is 550m2, with which both proposed lots comply.

16 The site is identified as "Biodiversity" pursuant to cl 7.6(2) of the PLEP 2014. As such, cl 7.6(3) and (4) require the Court, in exercising the functions of the consent authority, to consider the impact of the development on biodiversity as follows:

> (3) Before determining a development application for development on land to which this clause applies, the consent authority must consider—
>
> (a) whether the development is likely to have—
>
> (i) any adverse impact on the condition, ecological value and significance of the fauna and flora on the land, and
>
> (ii) any adverse impact on the importance of the vegetation on the land to the habitat and survival of native fauna, and
>
> (iii) any potential to fragment, disturb or diminish the biodiversity structure, function and composition of the land, and
>
> (iv) any adverse impact on the habitat elements providing connectivity on the land, and
>
> (b) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.
>
> (4) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that—
>
> (a) the development is designed, sited and will be managed to avoid any significant adverse environmental impact, or
>
> (b) if that impact cannot be reasonably avoided by adopting feasible alternatives—the development is designed, sited and will be managed to minimise that impact, or
>
> (c) if that impact cannot be minimised—the development will be managed to mitigate that impact.

17 The Flora and Fauna Assessment Report dated 6 August 2018, the Aboricultural Opinion dated 28 July 2019, the Tree Protection Plan dated September 2019 and the letter of the arborist dated 8 June 2020 allow me to consider the matters in cl 7.6(3). As a result of those reports and documents, I am satisfied that the development is designed, sited and will be managed to

avoid any significant adverse environmental impact, consistent with cl 7.6(4)(a).

18 Part of the site is mapped as "Geotechnical Hazard" in accordance with cl 7.7 of the PLEP 2014. Accordingly, cll 7.7(3) and (4) requires the Court, in exercising the functions of the consent authority, to consider the geotechnical risks as follows:

> (3) Before determining a development application for development on land to which this clause applies, the consent authority must consider the following matters to decide whether or not the development takes into account all geotechnical risks—
>
> (a) site layout, including access,
>
> (b) the development's design and construction methods,
>
> (c) the amount of cut and fill that will be required for the development,
>
> (d) waste water management, stormwater and drainage across the land,
>
> (e) the geotechnical constraints of the site,
>
> (f) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.
>
> (4) Development consent must not be granted to development on land to which this clause applies unless—
>
> (a) the consent authority is satisfied that the development will appropriately manage waste water, stormwater and drainage across the land so as not to affect the rate, volume and quality of water leaving the land, and
>
> (b) the consent authority is satisfied that—
>
> (i) the development is designed, sited and will be managed to avoid any geotechnical risk or significant adverse impact on the development and the land surrounding the development, or
>
> (ii) if that risk or impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that risk or impact, or
>
> (iii) if that risk or impact cannot be minimised—the development will be managed to mitigate that risk or impact.

19 The engineering plans show that the levels of the proposed lots are such that stormwater from proposed Lot 2 will be conveyed from the site to the kerb in Powderworks Road, and stormwater from the works on proposed Lot 1 will be conveyed to the proposed kerb in Bellara Avenue. Further, both proposed lots are serviced by the sewer main, which will enable disposal of wastewater for future development on Lot 1. As a result, I am satisfied that the development

will appropriately manage wastewater, stormwater and drainage across the site, consistent with cl 7.7(4)(a). Further, the geotechnical evidence, described in the expert evidence below, allows the Court to consider the matters in cl 7.7(3) and as a result I am satisfied that the development is designed, sited and will be managed to avoid any geotechnical risk or significant adverse impact, consistent with cl 7.7(4)(b)(i).

20 Clause 7.10 of the PLEP 2014 requires the Court, in exercising the functions of the consent authority, to be satisfied that essential services are available for the proposed development. Specifically, cl 7.10 provides:

> **7.10 Essential services**
>
> Development consent must not be granted to development unless the consent authority is satisfied that any of the following services that are essential for the development are available or that adequate arrangements have been made to make them available when required—
>
> (a) the supply of water,
>
> (b) the supply of electricity,
>
> (c) the disposal and management of sewage,
>
> (d) stormwater drainage or on-site conservation,
>
> (e) suitable vehicular access.

21 I am satisfied that the subject site is already supplied with access to water, electricity and sewage, and that the plans the subject of the development application demonstrate acceptable stormwater management measures and suitable vehicular access. Therefore, cl 7.10 is satisfied.

22 Section 7.4 of the EPA Act sets out the requirements of a VPA. A VPA provides a lawful manner in which interests in land can be dedicated to Council (see *Sanctuary Investments Pty Ltd v Baulkham Hills Shire Council* (2006) 153 LGERA 355; [2006] NSWLEC 733 at [42]-[46]). Clauses 7.4(1) and (2), insofar as relevant, describe a VPA in the following manner:

> (1) A planning agreement is a voluntary agreement or other arrangement under this Division between a planning authority (or 2 or more planning authorities) and a person (the developer)—
>
> …
>
> (b) who has made, or proposes to make, a development application or application for a complying development certificate, or
>
> …

> under which the developer is required to dedicate land free of cost, pay a monetary contribution, or provide any other material public benefit, or any combination of them, to be used for or applied towards a public purpose.
>
> (2) A public purpose includes (without limitation) any of the following—
>
> > (a) the provision of (or the recoupment of the cost of providing) public amenities or public services,
> >
> > …
> >
> > (c) the provision of (or the recoupment of the cost of providing) transport or other infrastructure relating to land,
> >
> > …

23 In exercising the functions of the consent authority, the Court has the power to impose conditions of consent, pursuant to ss 4.16(1) and 4.17 of the EPA Act. Pursuant to s 7.7(3), this power extends to the imposition of the condition of consent that requires the developer to enter into a VPA in the terms of the offer made by the developer.

24 The applicable development control plan is the Pittwater 21 Development Control Plan ("P21 DCP"), and clause B2.2 relates to the subdivision of land in low density residential areas. The size and dimensions of the two proposed lots meet the controls within clause B2.2, and the evidence of the town planners (discussed below) is that the indicative architectural plans demonstrate that proposed Lot 1 is capable of providing a dwelling that is safe from hazards and does not unreasonably impact on the natural environment. As such, the controls within clause B2.2 are met by the proposed development.

25 Clauses C4.1, C4.2, C4.3, C4.6 and C4.7 of the P21 DCP also concern the subdivision of land, and the controls within each are met by the proposed development. In particular, the proposed development demonstrates that suitable off-street parking and turning facilities can be provided for proposed Lot 1, that the proposed turning bay will be suitable for passenger, truck and emergency vehicle movement in Bellara Avenue, that vehicle access to proposed Lot 2 will continue to be from Powderworks Road, and that each property achieves the level of amenity required by clause C4.7.

26 Clause B3.1 concerns landslip hazard, and has been complied with in the provision of the geotechnical evidence, described in the expert evidence below. Clause B4.4 concerns flora and fauna habitat enhancement, and Clause B4.22

concerns the preservation of trees and bushland vegetation. In relation to each of these controls, the proposed development is supported by a suitable Flora and Fauna Assessment Report, which demonstrates that the proposed development will adequately retain and conserve trees, bushland vegetation and flora and fauna habitat.

The proposed VPA

27 The proposed VPA, as agreed following negotiations carried out after the initial offer to enter into a VPA, is between the developers, Keenwill Pty Ltd ("Keenwill") and Robert Corless, and the Council. Keenwill is the owner of the land known as 31 Bellara Avenue, and Mr Sanderson is the sole director and secretary of Keenwill, and together with Mrs Sanderson they own all of the issued shares in Keenwill. Robert Corless is the owner of the land known as 66 Powderworks Road.

28 On or about 16 September 2019, the applicants and Keenwill made an offer to enter into a planning agreement with the Council subject to approval of the development application the subject of these proceedings. The offer was accompanied by a draft VPA.

29 Following the submission of the original offer, the applicants entered into negotiations with the Council. As a consequence of those negotiations the offer to enter into a planning agreement was revised so that it was made by Keenwill as the owner of one lot of land, and Mr Corless as owner of the other lot, so that the agreement would apply to all of the land the subject of the development application. As a result, on 6 February 2020, Mr Corless signed a letter endorsing and agreeing to the amended offer to enter into a draft VPA.

30 The draft VPA and an Explanatory Note were publicly notified from 29 February 2020 to 29 March 2020 as required by s 7.5 of the EPA Act and cll 25D and 25E of the Environmental Planning and Assessment Regulation 2000.

31 There were some further minor changes made to the draft VPA between 15 May and 19 May 2020 as a result of further negotiations, which were accepted by Keenwill and by Mr Corless, resulting in the proposed VPA. This was then offered to the Council and accepted by the Council at its meeting on 26 May 2020. Further, both Keenwill and Mr Corless have executed the proposed VPA.

32 The proposed VPA provides for the dedication of land by the developer, being approximately 101.4m2 of land, and the construction of road surface and retaining wall to function as a three-point turning bay. The area to be dedicated is the road surface of the turning bay, which allows Bellara Avenue to have a turning head to allow three-point turns at its end, located on a public road controlled by the relevant Roads Authority. The area where the retaining walls are to be constructed is not to be dedicated, with the consequence that the ongoing maintenance of the retaining walls will be the responsibility of the landowner of proposed Lot 1.

33 I am satisfied that the proposed VPA meets the requirements of s 7.4 of the EPA Act, including that it provides for the dedication of land to be used for a public purpose. The original VPA offer was made by the applicants for development consent who meet the definition of "developer" under s 7.4(1)(b). It was also made by Keenwill, and endorsed by Mr Corless, who are the nominated developers under the proposed VPA. The latter are associated with the applicants within the meaning of s 7.4(1)(c), in Keenwill's case being a company wholly under the control of the applicants for development, and in Mr Corless's case being a person who gave landowner's consent to the lodging of the development application. The proposed VPA will formalise the end of Bellara Avenue and result in a turning bay on the public road. I consider that the proposed VPA also meets all the remaining requirements of s 7.4. Therefore, the Court has power to require that the proposed VPA be entered into as a condition of consent, pursuant to s 7.7(3)(a).

Expert evidence

34 Expert opinion evidence was given in the form of expert reports. Expert opinion evidence on the safety and adequacy of the proposed turning bay was given by Mr Patrick Bastawrous, the traffic engineering co-ordinator for the Council, and by Mr Michael Logan, a traffic consultant engaged by the applicants. They agree that the design of the turning bay is adequate, and that there is no risk to pedestrian safety.

35 Expert opinion evidence on the arboricultural impact of the proposed development was given by Ms Chantalle Hughes, an arborist engaged by the

Council, and Ms Catriona MacKenzie, an arborist engaged by the applicants. They agree that there are 19 of the site's 56 trees that would be removed to accommodate the turning area for the subdivision works, and to allow for the indicative driveway and dwelling footprint. Four of those 19 trees would be removed for the construction of the turning bay and retaining walls. Of the 19 trees, 2 are of high retention value. Nevertheless, their agreed expert opinion evidence is that there are no unacceptable tree-related impacts, that the proposed conditions of consent and the Tree Protection Plan of September 2019 adequately provide for the protection of the remaining trees and for the planting of four trees to replace those removed for the vehicle turning bay.

36 Expert opinion evidence on the town planning matters was given by Mr Vaughan Milligan, a planning consultant engaged by the applicants, and Ms Claire Ryan, a town planner employed by the Council. Mr Milligan and Ms Ryan agree that the proposed development is low impact, does not have an adverse impact, is of a scale integrated with the landform and landscape, does not require the removal of an unacceptable number of medium and high retention value trees and results in subdivided lots of an appropriate size. They also agree that the proposed development is supported by schematic architectural plans that demonstrate that a building footprint of suitable dimensions can be achieved on the site with acceptable height, bulk, scale, slope and recreation space and that, therefore, future development on the resultant lot will not unreasonably impact the natural environment, will have safe access and will be reasonably compliant with development controls.

37 Expert opinion evidence on geotechnical risk management was given by Mr Ben White, a geotechnical engineer engaged by the applicants. He considered the construction of the turning bay, including excavation for that purpose up to a depth of around 3.2m. The result of his observations and investigation is that, if the requirements in his report are followed, there will not be any geotechnical hazards. Those requirements are recorded in his report of 12 June 2020 (filed 14 June 2020) and include, inter alia, the types of excavator that can be used, the excavation support requirements, the design for the foundations and retaining structures and the requirements for inspections by a geotechnical

consultant. The parties propose a condition of consent that requires the development to be carried out in accordance with this report.

The resolution of the contentions originally raised by the Council

38 In its Statement of Facts and Contentions filed in the proceedings on 8 August 2019, the Council raised only contentions concerning insufficient information to assess the development application. The Council now considers that those contentions have been resolved through the provision of additional information, most of which was the subject of a grant of leave by the Assistant Registrar on 17 April 2020. In particular:

- Contention 1, which concerned the adequacy of information with respect to biodiversity, was resolved by the provision of the Arboricultural Opinion dated 28 July 2019 and the Tree Protection Plan dated September 2019. That additional information, together with the Flora and Fauna Assessment Report, adequately demonstrates that the proposed development will not result in a significant loss of canopy cover or net loss of native canopy trees, and will adequately retain habitat and provide adequate buffer to wildlife corridors.
- Contention 2, which concerned the adequacy of information concerning geotechnical, landslip and excavation and landfill hazard, was resolved by the provision of schematic architectural plans on 10 April 2020 for a dwelling house on proposed Lot 1, and by the updated geotechnical report of 12 June 2020 (filed 14 June 2020). Mr Milligan and Ms Ryan agree that this additional information adequately demonstrates that future development on the resultant lot can be designed and constructed to remove risk to an acceptable level for the life of the development, is not anticipated to require unacceptable earthworks, has low landslip risk and matches the geotechnical conditions of the land.
- Contentions 3 and 5 concerned the compliance of the proposed subdivision with the requirements of clause B2.2 of the P21 DCP relating to the subdivision of land in low density residential areas, and the lack of information with respect to the design and amenity of future development on the resultant lots. Mr Milligan and Ms Ryan agree that these contentions were resolved by the provision of the schematic architectural plans, the Arborist Report and the Tree Protection Plan, which demonstrate that a building footprint of greater than 175m2 with suitable dimensions, setbacks and a slope of less than 30% can be achieved on proposed Lot 1, and that future development on proposed Lot 1 is safe from hazards, does not unreasonably impact on the natural environment, and has safe and adequate access.
- Contention 4 raised the concern with respect to safe and functional access for vehicles, cyclists and pedestrians. Mr Milligan and Ms Ryan agree that this contention is resolved by the plans for the turning bay and the swept path diagram, which demonstrate that safe and functional vehicular access from the

road to the resultant lot can be achieved, and that the turning bay provides adequate access for safe vehicular movements.

39 In its Amended Statement of Facts and Contentions filed on 13 May 2020, the Council raised only one contention concerning the maintenance of the turning bay and retaining walls. It now agrees that this has been resolved by the condition of consent requiring entry into the proposed VPA.

The issues raised by the resident objectors

40 The development application was notified to adjoining landowners and occupiers in September 2018, and again in April 2020 following its amendment. The submissions received from residents in response to each notification are in evidence before the Court. The draft VPA was publicly notified from 29 February 2020 to 29 March 2020 in accordance with the provisions of the Environmental Planning and Assessment Regulation 2000, and the submissions received in response are similarly in evidence before the Court. Resident objectors also gave evidence and made submissions at the commencement of the conciliation conference on 29 August 2019, as well as in writing for the hearing in accordance with paragraph 11 of the Court's COVID-19 Pandemic Arrangements Policy. Additionally, two resident objectors gave oral evidence at the commencement of the hearing.

41 The issues raised by the objectors can be summarised as follows:

- The proposal does not provide satisfactory arrangements for access, parking and services, and the proposed turning bay does not meet the relevant Australian standards, does not provide adequate road reserve, will reduce parking in the street and interfere with pedestrian movements.
- The proposal will block access across the site to adjoining properties for weed control, bushfire hazard reduction and other works to be carried out.
- The proposal does not demonstrate orderly and economic use and development of land, particularly as it is inconsistent with the lot patterns in the area, will exceed density requirements, and does not provide details of future development.
- The future dwelling will not integrate with the site and its surrounds, and will overlook adjoining properties.
- Concern about potential tree impacts and the impacts on wildlife.

42 One of the resident objectors, Mr Douglas Dewey of Wicklow Place in Killarney Heights, raised a number of additional issues, some of which are summarised as follows:

- Deficiencies in the proposed VPA.
- Inconsistency in the plans and reports the subject of the development application.
- The amendments to the development application to introduce a turning bay and to move the indicative building envelope result in a development that is a different proposal to the original development application, which he says is a jurisdictional point.
- Lack of procedural fairness to him as a resident objector, arising because there was no internal assessment by the Council that was made available to him but also because he wasn't availed of the expert reports and given a fair opportunity to be heard.

43 Mr Dewey has not established any genuine basis upon which the proposed VPA does not meet the statutory requirements for a VPA, and as such I do not accept that there are any deficiencies as alleged by him.

44 For the following reasons, none of the issues raised by the resident objectors warrant the refusal of the proposed development.

Safety of the turning bay and pedestrian safety

45 The issue raised by the various resident objectors is that the proposed turning bay is inadequate, does not meet the relevant Australian standards, does not provide adequate road reserve, will reduce parking in the street and interfere with pedestrian movements, and instead should be designed as a full turning bulb.

46 However, there is no area at the end of Bellara Avenue that is marked for public dedication for the purpose of a full turning bulb.

47 Further, Mr Logan and Mr Bastawrous, the traffic experts, agree that it is sufficient for the turning bay to be designed to safely accommodate the Australian Standard AS/NZS2890.2:2018 8.8m long medium rigid vehicle and the slightly larger 9.1m long waste collection vehicle. Their agreed opinion is that the turning bay is adequately designed to allow the large Council waste truck (9.1m) to turn in 3 movements, and therefore will accommodate smaller vehicles such as the smaller 8.8m medium rigid vehicle and the standard NSW

Fire and Rescue 7.8m Commander. This is supported by a swept path diagram. They also agree that with the inclusion of mountable kerbs, larger trucks can be accommodated during emergency situations. In circumstances where the turning bay safely accommodates the large Council waste truck, they both agree that full compliance with the design guidelines is deemed unnecessary in this instance.

48 Mr Logan and Mr Bastawrous also agree that trucks turning in the turning bay will not create an unsafe pedestrian environment, as the turning movements will not encroach into the footpath area and the pedestrian demand in the area is minimal. Further, they agree that the electricity lines and power poles on Bellara Avenue are located on the footpath and will not be impacted by trucks utilising the turning bay.

49 Additionally, the town planners, Mr Milligan and Ms Ryan agree that the proposed development is supported by plans demonstrating that off-street parking for two cars will be able to be provided for future development, consistent with B6.3 Off-Street Vehicle Parking Requirements of the P21 DCP. They also agree that the proposed development does not remove any on-street parking, as the end of Bellara Avenue is not formalised with kerb and gutter for such purposes, and that 31 Bellara Avenue is anecdotally unlawfully used for parking and turning by those other than owners and residents of the site and their visitors. They consider, and I accept, that this unlawful use cannot be used as a reason to refuse development consent.

50 As a result of the evidence before the Court, it is abundantly clear that the turning bay creates an improved outcome for the end of Bellara Avenue than what is currently there, allowing for the lawful turning of vehicles at the end of the road.

Access through the site

51 A number of residents gave evidence or made submissions that the proposed development will block access across the site to adjoining properties for weed control, bushfire hazard reduction and other future development to be carried out.

52 However, the site is privately owned and there is no evidence that any of the adjoining properties have any lawful right of access over either of the lots that form part of the site. For example, there is no evidence of any statutory right of access or any easement for access over the site.

53 The agreed evidence of Mr Milligan and Ms Ryan, which I accept, is that current unlawful access through the site cannot be used as a reason to refuse development consent.

54 I further note that some stairs that are located on the western boundary of the site, which are used by the residents of 30 Bellara Avenue to access their dwelling, are not affected by the proposed development, notwithstanding that there is no evidence of any statutory right of access or any easement for those stairs.

Density

55 A number of residents raised objections that the proposed development creates lot sizes that are not consistent with the density of the area, or not in character with the locality.

56 Contrary to this, the agreed evidence of Mr Milligan and Ms Ryan, which I accept, is that the P21 DCP and PLEP 2014 allow for minimum subdivision lot size of 550m2 for the site and its locality, which reflects the desired density of the area. The proposed lot sizes are in excess of 550m2, and are therefore consistent with the desired or envisaged density for the area. In my view, the proposed lots are also appropriately configured as they are regularly shaped when compared to the current lot configuration.

57 Further, Mr Milligan and Ms Ryan opine that the indicative architectural plans for the proposed Lot 1 demonstrate a dwelling house of a size and scale that is consistent with existing developments in the immediate vicinity and the locality. I accept their evidence, and that the proposed development will not result in lot or dwelling sizes that are out of character in the local area.

Concerns with respect to the future dwelling

58 A significant number of objections were directed to concerns with respect to the future dwelling that may be constructed on proposed Lot 1. In particular, the

residents submitted that any new dwelling on the site will result in a loss of privacy, views or solar access. Some residents submitted that the proposed development should incorporate plans for a dwelling house that demonstrate compliance with current planning controls, and others raised concerns about the indicative architectural plans lodged, citing non-compliance with setback controls and other controls within the P21 DCP.

59 However, consistent with the evidence of Mr Milligan and Ms Ryan, the proposed development does not include a proposal for the construction of a dwelling. No new dwelling is proposed under this application. Instead, the proposed development is supported by indicative architectural plans, which are for the purpose of demonstrating that the proposed lot 1 (on which there is currently no dwelling) can be developed. As stated by the experts, they are "conceptual only and not for approval". This is consistent with the requirements of C4.7 Subdivision - Amenity and Design of the P21 DCP, and the subdivision planning principle in *Parrott v Kiama Municipal Council* [2004] NSWLEC 77. Mr Milligan and Ms Ryan opine that the indicative plans demonstrate that the lots resulting from the proposed subdivision can be reasonably developed without unreasonable non-compliance or impacts. I accept that opinion.

60 Any future development application for the construction of a dwelling house on the site will be subject to a full assessment at the time of lodgement, and at that time, the impacts of the dwelling on adjoining properties, including on their privacy, views, and solar access, will be assessed.

Tree protection

61 Mr Coic gave oral evidence on behalf of the residents of 30 Bellara Avenue, who gave evidence at the conciliation conference and through written submissions. In particular, the residents of 30 Bellara Avenue are concerned about tree loss, notably trees 26, 11 and 25. Tree 26 is located on the land at 30 Bellara Avenue. They are also concerned about the visual impact of the loss of tree canopy from their outlook.

62 The agreed opinion of the arborists, Ms Hughes and Ms MacKenzie, is that the updated turning area shown in the engineering plans reduces impacts on tree 26. As a result, the estimated encroachment (less than 5.6%) into the Tree

Protection Zone (“TPZ”) is supportable and the tree will be protected through the specified steps in the Tree Protection Plan.

63 Further, Ms Hughes and Ms MacKenzie agree that tree protection in relation to tree 11 has been adequately addressed in the Tree Protection Plan and in the July 2019 report. In particular, there is no incursion into the calculated TPZ of tree 11, the excavation does not extend across the northwest area where it is located, and the tree will be protected through the specified steps in the Tree Protection Plan.

64 In relation to tree 25, Ms Hughes and Ms MacKenzie agree that the indicative building footprint and turning areas are outside the tree's calculated TPZ.

65 Finally, they agree that any canopy reduction would be limited to canopy conflicting with the indicative building footprint, and would be unlikely to visually impact the residents at 30 Bellara Avenue.

Biodiversity

66 The residents’ submissions also assert that the proposed development does not retain and enhance habitat, and results in a loss of natural bushland, contrary to the principles in the P21 DCP and the objectives of the zone.

67 There is no evidence to support this assertion. Instead, the evidence is that the proposed development will not result in a significant loss of canopy cover or net loss of native canopy trees, and will adequately retain habitat and natural bushland.

Inconsistency in the plans and reports

68 Mr Dewey raised issues with respect to inconsistency in the reports and documents the subject of the development application. It appears that, in part, this issue arises from the manner in which the amended documents are listed on the Council’s website, such that it was unclear to Mr Dewey what documents are superseded.

69 Further, following the oral evidence of Mr Dewey at the commencement of the hearing, the geotechnical report was updated to reflect the excavation required for the construction of the retaining walls and turning bay. The engineering plans were also updated to show the ground levels and the location of the

power poles, but no change was made to the proposed development through those updates. To make it clear, the documents that are relied upon for the development application are listed in the agreed conditions of consent, as follows:

Architectural Plans		
Drawing No.	**Dated**	**Prepared By**
Survey Plan Showing Proposed Subdivision Over Lots 36 Sec.1 in D.P.6462 and Lot 9 in D.P.242284	7 April 2020	CMS Surveyors

Engineering Plans		
Drawing No.	**Dated**	**Prepared By**
Sheet – 1/H Stormwater Management Details 31 Bellara Avenue, North Narrabeen	10 June 2020	Taylor Consulting
Sheet – 5/G Proposed Turning Area 31 Bellara Avenue, North Narrabeen	10 June 2020	Taylor Consulting

Reports / Documentation – All recommendations and requirements contained within:		
Report No. / Page No. / Section No.	**Dated**	**Prepared By**
Geotechnical Investigation J1789B	12 June 2020	White Geotechnical Group

Tree Protection Plan	September 2019	Urban Forestry Australia
Flora and Fauna Assessment	6 August 2018	GIS Environmental Consultants
Arborist Report (Arboricultural Opinion)	28 July 2019	Urban Forestry Australia
Letter	8 June 2020	Urban Forestry Australia

70 I do not accept that there is any inconsistency within those documents that makes the development application unclear in any way, or that otherwise warrants its refusal. The development application is for the subdivision of land, the detail of which is shown on the survey plan showing the proposed subdivision. The detail of the subdivision works that are required to be carried out is shown on the engineering plans. The arborist report and the Tree Protection Plan show that 19 trees are to be removed as part of the subdivision works. Specific aspects of that report and the Tree Protection Plan are updated by the letter of the arborist dated 8 June 2020, but no change is made to the proposed works by that letter. The only report that has not been updated to reflect the turning bay works is the Flora and Fauna Assessment Report, and, based on the evidence of the arborists I consider that there is no need for there to be an update to that report.

Jurisdictional issue from the amendment to the application

71 Mr Dewey also submits that there is a jurisdictional issue arising from the amendments to the development application, which he says include moving the indicative building footprint and incorporating the construction of the turning bay and the dedication of land to the Council. He says that these amendments "changed the scale, nature and character of the proposed development so radically, that, in substance, it is a different proposal… which is beyond the jurisdiction of the Court."

72 It appears that, in making this submission, Mr Dewey is referring to the power to allow amendments to a development application under cl 55 of the Environmental Planning and Assessment Regulation 2000, and the decision of Jagot J in *Radray Constructions Pty Ltd v Hornsby Shire Council* (2006) 145 LGERA 292; [2006] NSWLEC 155 on whether that power is available to the Court. In considering this question, Jagot J says, at [16]:

> "I prefer to ask whether the development now proposed is an amendment or variation of the application recognising that amendment or variation may result in a change to the proposed development, but the Court has no jurisdiction to entertain an original application."

73 Her Honour's comments relate to the exercise of the power under cl 55, which, in these proceedings, was already exercised by the Court upon the grant of leave to the applicants to amend the development application, and is not under review at the hearing of the appeal.

74 In any event, the submission has no substance. The development application as lodged with the Council, and the proposed development as now before the Court, are both for the consolidation of the two lots and the re-subdivision of the land into two lots. The amendments changed aspects ancillary to the subdivision, including the construction of retaining walls and the dedication of a small portion of proposed Lot 1 to the Council, but did not change the nature of the development application in any material way.

Procedural fairness

75 Mr Dewey also asserted that he has been denied procedural fairness. It seems that this assertion is made on the basis that he says he has not had the opportunity to speak to "a single set of plans and reports" or to speak in response to the content of the expert reports.

76 The requirement to provide procedural fairness depends upon the statutory framework of the power exercised, and on the facts and circumstances of the particular case (see *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* 228 CLR 152; [2006] HCA 63 at [26]).

77 The extent to which the Council, and the Court on appeal, is required to provide procedural fairness to the residents is informed by the statutory or regulatory requirements for notification by the Council and the requirement

under s 4.15(1)(d) of the EPA Act to consider "any submissions made in accordance with this Act or the regulations". Beyond this, a common law duty of procedural fairness might arise if there is a particular right or interest of Mr Dewey's that will be adversely affected. However, Mr Dewey has disclosed no such right or interest.

78 The notification of the development application, and the amended development application, was limited to the adjoining landowners and occupiers, in accordance with the Northern Beaches Community Participation Plan. Mr Dewey, who is not an adjoining landowner or occupier, nevertheless received notice, perhaps through a relative who resides at 64 Powderworks Road. As a result, Mr Dewey availed himself of the following opportunities to make submissions concerning the development application:

- In writing on 27 September 2018, following the notification of the original development application to adjoining neighbours between 11 and 27 September 2018.
- By the making of oral submissions at the commencement of the conciliation conference on 29 August 2019.
- In writing on 27 March 2020, following the public notification of the draft VPA.
- In writing on 10 May 2020, following the notification of the amended development application to adjoining neighbours between 21 April and 11 May 2020.
- In writing on 26 May 2020, for the purpose of the Council meeting on the proposed VPA.
- In writing prior to the court hearing, consistent with paragraph 11 of the Court's COVID-19 Pandemic Arrangements Policy.
- In oral evidence at the commencement of the hearing on 4 June 2020.

79 There can be no doubt that, following the public notification of the draft VPA and the notification of the amended application in April 2020, Mr Dewey had all the information available to him concerning the nature and the scope of the proposed development that is now before the Court. The plan of subdivision, shown on the survey plan dated 7 April 2020, was notified to the adjoining landowners and occupiers in April 2020, together with the engineering plans showing the proposed subdivision works. The only change to the engineering plans since that date was to include the ground levels and location of the power poles, which did not change the proposed works in any way.

80 The plan that shows the dedication of land to the Council, which is consistent with the survey plan showing the proposed subdivision, was exhibited with the notification of the draft VPA.

81 The arborist reports and the tree protection plan, setting out which trees were to be removed as part of the subdivision works, formed part of the amended application that was notified in April 2020, as well as forming part of documents that could be viewed in the public notification of the draft VPA.

82 As such, I am satisfied that Mr Dewey had all the necessary information available to him when he availed himself of the opportunity to make submissions following the notification of the amended application, and before the Court at the hearing.

83 The only documents that were not available to Mr Dewey were the updated geotechnical evidence and the joint reports in evidence in the proceedings. However, neither the regulatory requirements for notification nor the duty to afford procedural fairness extend to providing joint reports or other evidence to an objector, even if they are prepared in order to respond to issues raised by that objector. As put by Biscoe J in *Calardu Penrith Pty Ltd v Penrith City Council* [2010] NSWLEC 50 at [180], concerning procedural fairness to an objector:

> "Procedural fairness is not like a potentially endless game of tennis where every submission or ball [the objector] hit over the net had to be returned with the proponent's response until [the objector] stopped – even if [the objector] hit a winner, as it did when its submission was met. Nor is procedural fairness to be equated with a duty of unlimited discovery to an objector. No new issue had arisen. On receipt of the final material, the council was entitled to evaluate it and make a determination."

Other issues raised by the objectors

84 None of the remaining issues raised by the objectors, including those raised by Mr Dewey in his various submissions, warrant refusal of the development application. The remaining complaints are either not supported by the evidence, irrelevant, rely on clauses of the P21 DCP that do not apply to the proposed development or, for other reasons, do not warrant refusal of the development application.

Outcome of the appeal

85 The proposed development is appropriate for the site's location and context, and provides a suitable subdivision lot layout. Moreover, the proposed VPA provides a public benefit that results in a better outcome for the residents of Bellara Avenue and vehicles who use Bellara Avenue. None of the issues raised by the residents warrant refusal of the proposed development, and there is no evidence of actual adverse impacts of the proposed development on neighbouring properties. Given that the planning controls of the P21 DCP are met and the Council has raised no contention on the basis of which development consent should be refused, there is no basis to refuse the development application and it is granted accordingly subject to the conditions of consent as agreed between the parties.

86 The Court orders that:

(1) The appeal is upheld.

(2) Development consent is granted for the consolidation of the two lots known as Lot 9 of DP 242284 and Lot 36 of Sec 1 DP 6462, and the subdivision of the consolidated lot into two lots of land, subject to the conditions of consent in Annexure A.

(3) Exhibits 1-6 and 9 are returned.

……

J Gray

Commissioner of the Court

Annexure A (261388, pdf)

Attachment A (266232, pdf)

Attachment B (1808462, pdf)

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Amendments

02 July 2020 - Correction made to the Coversheet

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.